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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SURROGATES' COURTS

OF THE

STATE OF NEW YORK.

BY

AMASA A. REDFIELD.

VOL. II.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

	PAGE
ACKERMAN, MATTER OF (<i>N. Y. Co.</i>) Presumption of death from absence and old age.....	521
ACKERMAN, SENIOR v.....	302
ADAMS, MATTER OF (<i>Orange Co.</i>) Surrogate may compel executor to account for decedent's property transferred by latter in fraud of creditors.....	66
BOHDE v. BRUNER, (<i>N. Y. Co.</i>) In what securities investments to be made. Allowance to executors for expenses, etc.....	333
BOOTH v. CORNELL (<i>N. Y. Co.</i>) Lapsing of legacy to dissolved corporation. Conditional legacy:—vesting of gift in remainder. (See note, page 547.....	261
BRINK v. LAYTON. (<i>Steuben Co.</i>) Election between right of dower and proceeds of conversion. Rights of succession, not affected by agreement.....	79
BRITTON, FISHER v.....	
BROOKS, GILLESPIE v.....	349
BRUNER, BOHDE v.....	333
BAILEY v. STEWART (<i>N. Y. Co.</i>) Grounds for vacating probate. Judicial discretion. Void decree.....	212
BAKER'S WILL (<i>N. Y. Co.</i>) Foreign divorce. Undue influence. Burden of proof on beneficiary, when.....	179
BARSE, PIPER, v.....	19
BLANK, MATTER OF (<i>N. Y. Co.</i>) Where public administrator in New York county entitled to administration in preference to allowing in fact disqualified next of kin.....	443
BURK'S WILL (<i>N. Y. Co.</i>) Publication of will, requisites of. Undue influence, defined.....	239
CAMP v. CAMP (<i>Tioga Co.</i>) Advances, when to be taken into account, on distribution.....	141
CARMAN v. COWLES (<i>N. Y. Co.</i>) Distribution of unsold assets or securities, how far permissible.....	414
CASE, YOUNG v.....	55

	PAGE
COLHOUN v. JONES (<i>Orange Co.</i>) What facts sufficient proof of monomania and undue influence. Burden of proof on legatee who was testator's physician	34
CORNELL, BOOTH v.	261
CORNWELL v. DECK (<i>Steuben Co.</i>) Administrator not allowed for expenditures on real property, etc. Exempt articles not allowed widow, unless inventoried, when	87
CORNWELL, GAZLAY v.	139
COWLES v. CARMAN	414
CRANDALL v. SHAW (<i>Cortland Co.</i>) Special administrator appointed in anticipation of contest. Practice on application for appointment	100
CRAM v. CRAM (<i>N. Y. Co.</i>) Executors' commissions when allowed annually. Double commissions to testamentary trustees and executors	244
CURRAN v. SEARS (<i>N. Y. Co.</i>) Jurisdiction of Surrogate of New York county, under act of 1870, to construe will on probate. Devise to trustees of corporation, when sufficient as devise to corporation. Construction of act of 1860, limiting charitable bequests.	526
DAMARELL v. WALKER. Incompetency for which guardian is removable. Uncontested probate how far conclusive on collateral proceedings	198
DECK, CORNWELL v.	87
DELAFIELD, FOSDICK v.	392
DUFFY, HART v.	151
DUGAN, FAGAN v.	341
EAGER v. ROBERTS (<i>N. Y. Co.</i>) Executor not joining in inventory, not allowed commissions	247
EDSALL v. WATERBURY (<i>Orange Co.</i>) Trustee by implication. Widow shares in undisposed of estate, notwithstanding legacy to her in lieu of dower	48
ESPIE, MATTER OF (<i>N. Y. Co.</i>) Void decree when vacated. Practice on application to Surrogate to sign record of unfinished business	445
FAGAN v. DUGAN (<i>N. Y. Co.</i>) Undue influence which will avoid a will	341
FIELD v. FIELD (<i>Westchester Co.</i>) What may be reserved for litigated claims, on distribution	163
FISHER v. BRITTON (<i>N. Y. Co.</i>) Guardian's commissions—annual rests	524
FOSDICK v. DELAFIELD (<i>N. Y. Co.</i>) Extrinsic evidence of testator's intent. Conditional appointment of executors	392
FRAZER, TERRY v.	
FREEMAN v. FREEMAN (<i>Cortland Co.</i>) Administrator not to pay debt of doubtful validity, and barred by statute	13

TABLE OF CASES REPORTED.

vii

	PAGE
FURNISS <i>v.</i> FURNISS (<i>N. Y. Co.</i>) Jurisdiction of Surrogate over testamentary trustees.....	497
GABES, MATTER OF (<i>Westchester Co.</i>) Surrogate will not grant allowance to counsel of unsuccessful litigant.....	144
GAZLAY <i>v.</i> CORNWELL (<i>Cortland Co.</i>) Statute of distribution construed.....	139
GILBERT, MARSH <i>v.</i>	
GILLESPIE <i>v.</i> BROOKS (<i>N. Y. Co.</i>) Duties of executors as to disposing of, and investing, assets. Liability for negligence. Statute of limitations—what is a seal. Executor's commissions, etc.....	349
GLANN, MATTER OF (<i>Steuben Co.</i>) Proceedings to sell real estate to pay debts, etc.....	75
GOODRICH, MATTER OF (<i>Orange Co.</i>) Lapse of legacy. Bequest void for uncertainty.....	45
GOULBURN <i>v.</i> SAYRE (<i>N. Y. Co.</i>) Practice-papers to be presented, though on the files.....	310
GRAHAM <i>v.</i> VAN DUZER (<i>N. Y. Co.</i>) Mingling of decedent's trust funds with funds of estate, liability of executor for.....	322
GREEN <i>v.</i> GREEN (<i>N. Y. Co.</i>) Administrator liable for lease held by decedent renewed in his own name.....	408
HAMMOND <i>v.</i> HOFFMAN (<i>Steuben Co.</i>) Liability of estate of a decedent on a joint judgment.....	92
HART, MATTER OF (<i>Westchester Co.</i>) Amount of security required by executor as alternative of removal. In what amount in proportion to penalty of bond, sureties must justify.....	156
HART <i>v.</i> DUFFY (<i>Westchester Co.</i>) Ground for opening decree settling executor's accounts.....	151
HITCHCOCK <i>v.</i> MARSHALL (<i>Westchester Co.</i>) Power of Surrogate to order payment of distributive shares to assignees thereof.....	174
HOFFMAN, HAMMOND <i>v.</i>	92
HOLBROOK, WADE <i>v.</i>	378
HOSFORD, MATTER OF (<i>Westchester Co.</i>) Surrogate's jurisdiction to appoint guardian of non resident minor.....	168
HOWELL, MATTER OF (<i>N. Y. Co.</i>) Practice as to verification of petition, etc.....	299
HOWELL, SMITH <i>v.</i>	325
HOWIE, SUMMERFIELD <i>v.</i>	149
JENNINGS <i>v.</i> JONES, (<i>Steuben Co.</i>) Conclusiveness on an heir of judgment against ancestor. Proceedings to sell real estate to pay debts, etc. Statute of limitations.....	95
JONES, COLHOUN <i>v.</i>	34
JONES, JENNINGS <i>v.</i>	95
JONES, MINOR <i>v.</i>	289
KERRIGAN <i>v.</i> KERRIGAN, (<i>N. Y. Co.</i>) Annuities, when payable.....	517
LARKIN, NICHOLL <i>v.</i>	236

	PAGE
LARROUR v. LARROUR, (<i>Steuben Co.</i>) Expenses of executor in continuing decedent's business, when allowed. Practice on final accountings.....	69
LATTON, BRINK v.....	79
LOPER, MATTER OF (<i>Kings Co.</i>) Power of executors to compromise debts due estate.....	545
LYNCH v. MAHONEY, (<i>N. Y. Co.</i>) Interest on legacies, from what time payable.....	434
MAHONEY, LYNCH v.....	434
MARSH v. GILBERT, (<i>N. Y. Co.</i>) Advancements,—testimony of interested party.....	465
MARSHALL, HITCHCOCK v.....	174
MCDERMOTT, TUCKER v.....	312
MCLAUGHLIN'S WILL, (<i>N. Y. Co.</i>) Testamentary capacity, as affected by intemperance, jealousy, etc.....	504
MATTER OF ACKERMAN.....	521
MATTER OF ADAMS.....	66
MATTER OF BLANK.....	443
MATTER OF ESPIE.....	445
MATTER OF GABES.....	144
MATTER OF GLANN.....	75
MATTER OF GOODRICH.....	45
MATTER OF HART.....	156
MATTER OF HOSFORD.....	163
MATTER OF HOWELL.....	299
MATTER OF LOPER.....	545
MATTER OF MCFEELEY.....	541
MATTER OF MOKE.....	429
MATTER OF MOUNT.....	405
MATTER OF O'NIEL.....	544
MATTER OF PIKE.....	255
MATTER OF RITCH.....	330
MATTER OF TEYN.....	303
MATTER OF TRAZNIER.....	171
MATTER OF WARD.....	251
MCDERMOTT, ORDISH v.....	460
MCFEELEY, MATTER OF (<i>Kings Co.</i>) Posting notice of sale of land under Surrogate's order. Effect of failure to post in accordance with Statute. Amendment.....	541
MINOR v. JONES (<i>N. Y. Co.</i>) Effect of emancipation on marriage of slaves.....	289
MOKE, MATTER OF (<i>N. Y. Co.</i>) Construction of appointment of <i>cestui que trust</i> , trustee, not favored.....	429
MOUNT, MATTER OF (<i>N. Y. Co.</i>) Executors entitled to commissions on what assets and out of what fund.....	405
NEUGENT v. NEUGENT (<i>N. Y. Co.</i>) Publication of will and subscription by witnesses.....	369

TABLE OF CASES REPORTED.

ix

	PAGE
NICHOLL v. LARKIN. Statute of limitations :—agreement of decedent to make provision for claimant at death.....	236
NORTON v. NORTON (<i>Herkimer Co.</i>) Execution and publication of will. Effect of full attestation clause as against non-recollection of only surviving witness.....	6
OLMSTEAD, SAVAGE v.....	478
O'NIEL, MATTER OF (<i>Kings Co.</i>) Letters of administration, on estate of deceased wife, not issued to administrator of husband.....	54
ORDISH v. McDERMOTT (<i>N. Y. Co.</i>) Implied revocation of will. Will not revoked by discovery of existence of child not known when will was made.....	460
PIKE, MATTER OF (<i>N. Y. Co.</i>) Double commissions to executors acting also as trustees.....	255
PIPER v. BARSE (<i>Herkimer Co.</i>) Advancements; ademption of legacy, proof of.....	19
PUBLIC ADMINISTRATOR, RENHOLM v.....	456
PUBLIC ADMINISTRATOR, SHEERIN v.....	421
RENHOLM v. THE PUBLIC ADMINISTRATOR, (<i>N. Y. Co.</i>) Declarations and repute to prove marriage.....	456
RITCH, MATTER OF (<i>N. Y. Co.</i>) Accounting by one of several executors, etc., may be compelled.....	330
ROBERTS, EAGER v.....	247
ROGERS v. ROGERS (<i>Orange Co.</i>) Interest on legacy, payable one year after letters issue.....	24
RUTHVEN, WHEELER v.....	
SANDERS v. STILES (<i>Herkimer Co.</i>) Insufficient publication of will, by reason of testator's unconsciousness, at time.....	1
SAVAGE v. OLIMSTEAD (<i>N. Y. Co.</i>) Payment to parent of minor legatee, not authorized, without guardianship and bond.....	478
SAYRE, GOULBOURN v.....	310
SEARS, CURRAN v.....	
SENIOR v. ACKERMAN (<i>N. Y. Co.</i>) Removal of executor and guardian for insolvency. Security required :—what are assets.....	302
SHAW, CRANDALL v.....	100
SHAW'S WILL (<i>Cortland Co.</i>) Testamentary capacity; delusions as to relatives. Dementia, evidence of.....	107
SHEERIN v. PUBLIC ADMINISTRATOR (<i>N. Y. Co.</i>) Liability of administrator for leaving decedent's deposits in a failing bank. Impugning inventory on accounting.....	421
SIMPSON'S WILL (<i>Orange Co.</i>) Will subscribed by mark may be proved, though one witness is dead.....	29
SMITH v. HOWELL, (<i>N. Y. Co.</i>) Proceedings on application for leave to issue execution.....	325
SPANNHAKE, WEBBER v.....	258

	PAGE
STEVENS v. STEVENS, (<i>N. Y. Co.</i>) Essentials of a gift <i>inter vivos</i> . Legacy to debtor. Construction of will.....	265
STEWART'S WILL, (<i>Steuben Co.</i>) Publication of will and request to witnesses, what is sufficient evidence of.....	77
STEWART, BAILEY v.....	212
STILES, SANDERS v. Execution of will. Request to sign.....	1
SUMMERFIELD v. HOWIE (<i>Westchester Co.</i>) Questions of title will not be tried in proceedings for search and seizure.....	149
SWARTWOUT v. SWARTWOUT (<i>Orange Co.</i>) Marriage of guardian may terminate guardianship.....	52
TALMADGE v. WILLIAMSON, (<i>N. Y. Co.</i>) What words in will prevent general legacies from vesting on death of testator.....	453
TORRY v. FRAZER, (<i>N. Y. Co.</i>) Liability of guardian for improper investments.....	486
TEYN, MATTER OF (<i>N. Y. Co.</i>) Expenditures allowed to executors and guardians. Investments by guardians.....	306
TRAZNIER, MATTER OF (<i>Westchester Co.</i>) Committee of non-resident lunatic minor cannot petition for guardian to account.....	171
TUCKER v. McDERMOTT (<i>N. Y. Co.</i>) Jurisdiction of Surrogate over testamentary trustees; commissions not allowed on annual accounting.....	312
VAN DUZER, GRAHAM v.....	322
WADE v. HOLBROOK, (<i>N. Y. Co.</i>) Undue influence. Revocation of will by simultaneous deed. Suspension of power of alienation.....	783
WALKER, DAMARALL v.....	198
WALLACE, WELLS v.....	58
WARD, MATTER OF (<i>N. Y. Co.</i>) Essentials of a gift <i>inter vivos</i>	251
WATERBURY, EDSALL v.....	48
WEBBER v. SPANNHAKE, (<i>N. Y. Co.</i>) Estate of married woman not liable for personal medical attendance.....	258
WELLS v. WALLACE (<i>Orange Co.</i>) On whose petition Surrogate may open decree. Jurisdiction of trusts of real property.....	58
WHEELER v. RUTHVEN, (<i>N. Y. Co.</i>) Interest on legacies, where pay- able. Where no assets come to hands of executor until after a year from death of testator.....	491
WHEELWRIGHT v. WHEELWRIGHT, (<i>N. Y. Co.</i>) Executors, etc., can- not anticipate their commissions.....	501
WILLIAMSON, TALMADGE v.....	453
WILLIAMSON v. WILLIAMSON, (<i>N. Y. Co.</i>) Where attesting witnesses should sign. Evidence sufficient to prove execution of will when two of three subscribing witnesses are dead....	449
YOUNG v. CASE, (<i>Orange Co.</i>) Gift in remainder vests on testator's death, when.....	55

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
SURROGATES' COURTS
OF THE
STATE OF NEW YORK.

HERKIMER COUNTY.—HON. AMOS H. PRESCOTT, SURROGATE.—AUGUST, 1869.

SANDERS v. STILES.

In the matter of the Probate of the last will and testament of ORTON STILES, deceased.

The testator, in his last sickness, very feeble and unconscious unless aroused, sent for a neighbor to draw his will, and stated that he wished all his property to go to his sister (who lived with him as housekeeper) and her son a lad of thirteen. The neighbor drew the will, omitting (by mistake, he testified) to provide for the lad, and then read the will to testator, who was aroused for the purpose and approved it after it was read, and directed the draftsman to sign for him. Without further formality, the draftsman did so, and added his own name as subscribing witness, and requested the lad to subscribe as the second witness which he did; but there was no evidence that the testator was conscious of this request or of the acts of signing. *Held* not a valid execution:*

THIS was a proceeding for the probate of the last will and testament of Orton Stiles deceased. The facts upon which the decision turns are detailed in the opinion.

S. EARLE, *Attorney for the proponent of the will.*

F. S. WILCOX, *opposed.*

* Compare *Norton v. Norton*, and *Matter of Stewart*, post.

SANDERS v. STILES.

THE SURROGATE.—The will propounded for probate as the will of Orton Stiles deceased was executed under very peculiar circumstances; he was a man always of feeble intellect, and for quite a long time prior to his death, sick and wasting away by a slow and lingering disease, the consumption. He made no effort however to make a will until the very night of his death. He was residing at the time of his death with the sole legatee named in the will, his sister, Roxana Sanders. He lived in his own house, but his said sister was the housekeeper. I have no doubt but that according to the adjudged cases the testator had sufficient mental capacity to make a valid will, provided it was done under favorable circumstances, the party drawing the same taking great pains to ascertain and carry out his wishes. The testator lived only about an hour after the will was drawn. He selected a neighbor, Clark F. Babcock, to draw the will, who arrived at the testator's house for that purpose about dark on the day of his death. As soon as Babcock arrived, he inquired of the testator what he wanted, and after hearing, he asked how he wanted his property to go, and the testator replied he wanted Roxy (Mrs Sanders) and Melville to have it. Melville is a nephew of the testator, and a son of Mrs. Sanders and is a boy thirteen years of age. At the time Babcock arrived, the testator was sleeping, and was awakened by Babcock for the purpose aforesaid. Babcock immediately commenced writing the will, and was engaged at it for the space of over an hour, during which time the testator was on the bed and was sleeping the most of the time. He was very low and feeble, and inclined to sleep, and evidently paid no attention to what was going on, except when he was aroused.

After the will was written by Babcock, according

SANDERS v. STILES.

to the proof on the part of the proponent, it was read over to the testator, and he was asked if it was all right, and he said it was just as he wanted it. Babcock then asked him if he (Babcock) should sign his name and be a witness to the will, and he said yes. The testator, according to the testimony of Babcock, at this time was very weak, and was unable to sign his name. Roxana Sanders, her son Melville, and Patrick Kiton, were the only persons with the testator at this time.

After the will had been read and approved, as herein stated, and Babcock had received directions to sign the testator's name, he went to the table and did so, and also signed his own name as a witness; and at the same time the boy Melville Sanders, at the request of Babcock, also signed his name to the attestation clause of the will, as a witness. Whether the testator was sleeping or not, or paid any attention to the signing, does not appear. No one swears that he did, but all the testimony shows that during most of the time he was sleeping, and apparently was all the while unconscious of what was going on, unless an especial effort was made to arouse him, and there is no evidence from any one that anything of that kind was done after the will had been read; and I think it is evident from the testimony, that except on the occasion aforesaid, when the will was read and the direction given to Babcock to sign his name, the testator did not pay any attention to what was going on, and that he was so weak and low that he was wholly unable to do so. Babcock swears that he told the testator that if he signed his (testator's) name to the will he should have to be a witness to the will, and the testator said he wanted him to be a witness. The will was not shown to the testator in any manner after his signature was placed to it by Babcock, the attestation

SANDERS v. STILES.

clause was not read to him after it had been executed, and he never in any manner acknowledged it to be his will, or stated it to be his will, after his name was put to it in the manner aforesaid; and indeed there is no evidence on the part of the proponent of the will that the testator ever knew or was at any time conscious of the fact that his name had been subscribed to the will.

Melville Sanders, the boy, 13 years of age, signed the will as a witness, at the request of Babcock, and he swears that no other person asked him to sign it, and no one else said anything to him about being a witness, and that the testator did no act and said nothing by which he in any manner indicated to him that he expected to have him or wanted him to be a witness to the will. The subscribing witness, Melville Sanders, was unable to say that the testator ever heard Babcock say that there must be two witnesses to the will. Babcock does not testify that the testator heard him when he said that Melville could be a witness to the will. The testator, according to Babcock's evidence, said nothing when the suggestion was made; he made no assent; and I think the fair presumption from the evidence is that he knew nothing about it.

In ordinary cases this boy would not have been asked to be a witness; his age, and the relations that existed between him and the only legatee, would have been regarded as objections of sufficient importance in the mind of almost any prudent man, so that some one else would have been selected. It is also proper to remark, that on the first hearing, when Babcock was sworn, and after he had fully related all that he then remembered, and his evidence was closed, he had not said a word about his having stated, at any time, that Melville could be a witness. He was recalled and gave the additional evidence on the adjourned day.

SANDERS v. STILES

But there is another extraordinary circumstance connected with the execution of this will. All of the witnesses for the proponent who were present at the time the will was executed swear that the testator told Babcock, in answer to the inquiry as to how he wanted his property to go, that he wanted Roxy and Melville to have it. Babcock testifies as follows: "I forgot to put in the boy's name into the will; that is the only reason that I did not put it in." It is then quite clear the paper propounded is not the will that the testator intended to make. He evidently did not understand it, or know what he was doing when he said it suited him; he evidently did not notice the alteration. He had said nothing indicating any change of intention; no reason was given why the change from the instructions given had been made; Babcock says he forgot all about the instructions, and that is the only reason why the will is not in accordance with the testator's directions. In other words, if the estate had been devised to the two, it would have been all right, but inasmuch as he forgot the instructions, and drew the will entirely different from the instructions, still it is claimed that it is the testator's will, and that he understood it, and that it should be sustained as a valid will.

From all the evidence in the case, I have come to the conclusion that the testator, at the time of the execution of the will, did not know and was not able to understand enough about the business to know what he was doing. I have come to the following conclusions:

First.—That the paper propounded as the last will and testament of Orton Stiles, deceased, was not at any time subscribed by the testator, and also that said paper is not his will.

Second.—That no subscription was ever made to said will by the testator in the presence of each of the wit-

NORTON v. NORTON.

nesses thereto, or acknowledged by him to have been so made to each of the attesting witnesses thereto.

Third.—That the said testator never did at any time, in any manner, declare the said instrument to be his last will and testament, or by any act or word indicate it to be his last will and testament, in the manner required by law in order to make it a valid will.

Fourth.—There is not sufficient evidence that each of the attesting witnesses were requested by the testator to sign the will as witnesses.

Decree accordingly.

HERKIMER COUNTY.—HON. AMOS H. PRESCOTT, SURROGATE—
SEPTEMBER, 1872.

NORTON v. NORTON.

*In the matter of the probate of the Last Will and Testament
of MORGAN NORTON, deceased.*

Where there is a full attestation clause, and the only witness, so far as he testifies affirmatively, supports due execution, the fact that he testifies in the negative as to some essential formalities, if it may be reasonably explained by presuming non-recollection, is not a reason for refusing probate.

Testator, an active and competent business man, wrote his own will, with full attestation clause. The will was produced from a place of safe-keeping among his papers, and the blank for the date appeared filled and the signatures made with the same ink, and apparently at the same time. The only surviving witness testified that he and the other witness signed immediately after testator's request to him that he should witness a paper which the testator produced as his will; but that according to his recollection, the testator did not sign in their presence nor acknowledge his signature, *Held*, sufficient to establish execution and publication.

Where there is no suggestion of incapacity, fraud or undue influence, the hardship or injustice of the will can have no weight in determining the sufficiency of the evidence of formal execution.*

THIS was a proceeding for the probate of the last will and testament of Morgan Norton, deceased.

* Compare *Sanders v. Styles*, ante p. 1, and *Matter of Stewart*, post.

NORTON v. NORTON.

The will was offered for probate by Rhoda C. Norton, the executrix therein named, and the principal legatee.

The probate was opposed by Mary A. Norton, a daughter of the testator by a former wife.

The will bore date, December 13th, 1861. The testator died in the month of September, 1872. The will was in the handwriting of the testator. There was a full attestation clause, also in the handwriting of the testator. One of the witnesses to the will died sometime before the testator. The testator died, leaving him surviving his widow, Rhoda C. Norton, who was named as executrix in the will, and four children, one of whom, Mary A. Norton, a daughter by a former wife, appeared and contested the validity of the will. The children surviving were each daughters, and the other three were children of the last marriage. The testator was last married in the year 1846.

DEWEY and FISKE, for the proponent of the will.

SMITH and HENDERSON for MARY A. NORTON in opposition.

THE SURROGATE.—The only questions now under consideration related to the execution of the will. The evidence clearly established the fact that the testator, at the time of the execution of the will, was in the full possession of his mental faculties, and there was no question raised, but that he was a man of decided capacity. The estate was quite large, consisting mostly of real estate, and is principally devised to his late wife.

The evidence of the surviving subscribing witness was as follows:

Benoni H. Hemminway, being duly sworn, testified:

"I now reside at Russel, in St. Lawrence County. In December, 1861, I lived in the town of Norway, and knew Morgan Norton in his life-time. He lived in Nor-

NORTON v. NORTON.

way. I resided on his place, about 40 rods from his residence. I went there in 1861, at his request. I found him at his house. It was the last part of the year 1861. Lyman Carr was present at this time, I think. I found him in his private room. He said he sent for me to come and witness his last will and testament. He left his private room and went out. He soon came back with a paper in his hand, and laid it down on his writing desk, and asked me to sign it. I signed the paper. The paper produced [the paper spoken of by the witness is the last will and testament, dated December 13th, 1861,] is my handwriting, and I suppose that to be the paper. He was present, and Mr. Carr. After I signed it, Mr. Carr took the seat at the desk that I had occupied, and I supposed he signed it. I understood he sat down for that purpose. I went away soon. Carr was present when he asked me to witness his last will and testament. I had known him for some length of time. He was not sick a-bed at that time. I did not notice but that he appeared as he had for the last four or five months. He was lame as usual. He said nothing to me except that he wanted me to witness his last will and testament, and then he got the paper and asked me to sign it."

On his cross-examination, the witness further testified, that "he went out into the kitchen, and I did not see him. He came back and laid the paper down. I think he did not ask me to sign again after he brought in the paper. I then signed it without any more being said. I did not see him speak or motion to Mr. Carr as I left my seat. Mr. Carr took it. I did not notice. Mr. Carr signed his name. I did not stand and look at him. I supposed he signed, because his signature is there. I have no means of knowing this paper except from my own signature upon

NORTON v. NORTON.

it. I should not know it was the same paper except from my signature. I cannot swear that I *saw* Mr. Norton write. I don't think I *saw* him take a pen while I was there. I have no recollection of his showing me a signature which he said was his. After Mr. Carr had signed, Mr. Norton picked up the paper and laid it away. I do not recollect of acting on any other request except the one he first made. I have no recollection of anything except what he said before he got the paper. I recollect he came in, and laid the paper down. The writing mentioned was on his desk. I recollect I took the seat at the desk and signed before Mr. Carr did; and after I signed, Mr. Carr took the same seat. Those things are clear in my mind.

"I can't tell the appearance of the paper at the time I signed. I did not see any writing or seals that I recollect. I think I saw no seal on the paper. The paper was not opened or exhibited to me. I am as clear in my own mind about that as upon any other thing that I have testified."

On his re-examination the witness testified: "There was nothing read to me from the paper that I recollect. My opinion is, that there was not anything read from the paper. I had seen Mr. Norton write his name, but I am not well enough acquainted with his hand-writing to swear to it. I did not place my mind strongly on what occurred, and it has seldom crossed my mind since. It is my candid opinion he did not sign the paper while I was there. I never signed but one paper with Mr. Carr at Mr. Norton's house."

On his re-cross examination the witness further testified: "The transaction made some impression on my mind at the time, and for a short time, when my mind turned to that, I might think of some things that happened at that time. I don't think I have left out

NORTON v. NORTON.

anything that occurred at that time. It was an unusual thing for me. I have not thought of this transaction often since it occurred."

The subscribing witness is a man unacquainted with the business of making wills, and therefore would not be likely to remember what did occur, especially after the lapse of time intervening between the transaction and the time when he was sworn as a witness, a period of almost eleven years. He distinctly remembers, however, that he was sent for by the testator, and that when he arrived, he found him in company with Carr, the other witness, and of what had occurred between the testator and Carr, before he arrived, he had no knowledge. Carr was doubtless present for the purpose of witnessing the will. As soon as the witness arrived, the testator said to him, in the presence of Carr, that he had sent for him to come and witness his last will and testament. The testator then stepped into another room, returning in a moment, and laid the paper down upon his desk. The witness came to witness a will,—was told so,—he sat down at the desk and signed his name to the paper. Carr, the other witness, signed immediately after him, and all this occurred in the presence of the two witnesses and the testator. The witness has no recollection that the testator signed the will at that time, or made any other declaration, except the one before referred to, or that anything was read to him, and has no recollection of seeing any signature or seal or writing, or that the testator had a pen in his hand.

The evidence, taken altogether, shows, in my judgment, simply, that the witness fails to remember what did occur. His opinion of what took place is not evidence, and amounts to nothing. The witness thinks he did not see any writing whatever. His name is

NORTON v. NORTON.

signed on the first line below the attestation clause, and so near to it, that it would be almost impossible for the witness to write his name in the manner in which it is written, without seeing the writing above. The will and the attestation clause are in the same hand-writing, and in the same ink, except the date; and the signatures of the testator and the witnesses, and the date of the will, are in the same ink, and apparently made at the same time.

In this case, the will and the attestation clause are clearly in the hand-writing of the testator, and the evidence is clear that the testator deliberately attempted to make his will, while in the full possession of all his mental and intellectual faculties. The will is carefully and properly drawn for the purpose of carrying out the obvious purposes of the testator, and he adds to it a full attestation clause. When that clause was written, the testator learned, beyond a doubt, what was necessary to be done in order to have the will properly and legally executed. He must have known and then understood that it should be signed, declared, and published, and the witnesses requested to subscribe the same. He could not have written the attestation clause without such an understanding, if he was a man of fair capacity, which is conceded. He afterwards told his wife he had made his will, and after his death, the same was found in his safe, carefully preserved, with all the appearance of due execution, and there are no circumstances of suspicion proved or suggested; and the testator, having made the will himself, without assistance or advice, so far as it appears, there can be no suspicion of fraud or imposition, and the only question in the case is, as to whether or not the testator has failed, in consequence of technical difficulties, in accomplish-

NORTON v. NORTON.

ing what he clearly designed. I do not think he has. The evidence is conclusive to my mind, that on the occasion testified to by Mr. Hemminway, the will having been prepared before, except the date, that he signed the will then and there, in the presence of the two witnesses, and properly published the same, and requested them to subscribe it as witnesses to its due execution, and also inserted the date.

The evidence discloses that the testator had been a business man all his life-time. What is probable under the circumstances? If the will was signed at the time it was attested, it is valid beyond a doubt. Would the testator simply procure the signatures of the two witnesses, then dismiss them, lay the will aside, and leave the date and signature blank? If he knew enough to write the will, and the attestation clause, he certainly would understand that it must be executed in the presence of the witnesses. Hemminway swears that after the witnesses had signed, he picked it up and laid it away. The hand-writing of the testator, and the subscribing witness that is since dead, have been properly proved according to law.

The following cases are referred to upon the question of what is necessary, in making a valid will, in regard to signing declaration and publication. In *Chaffee v. The Baptist Missionary Convention* (10 Paige, 85,) the Chancellor says that prudence requires that a proper attestation clause should be drawn, showing that all the statute formalities were complied with, not only as presumptive evidence of the facts, in case of the death of the witnesses, or when from lapse of time they cannot recollect what did take place," &c.

"The onus of satisfying the Court that these forms were complied with, lies upon the party seeking to establish the will. But the fact of such compliance may be

NORTON v. NORTON.

proved by other evidence or inferred from circumstances, where the subscribing witnesses are dead or absent or otherwise incapacitated to give testimony, or where, from the lapse of time, or otherwise, they are unable to recollect whether the requisite formalities were observed at the time when they witnessed the execution of the instrument."

In that case, the will was offered for probate within three or four years after it was executed, and it appeared clear affirmatively by the evidence of the witnesses, that the will was not signed or acknowledged in the presence of the witnesses.

In the case of *Jauncy v. Thorne* (2 Barb. Ch., 40), WALWORTH, Chancellor, decided that, "a will may be sustained even in opposition to the positive testimony of one or more of the subscribing witnesses who either mistakenly or correctly swear that the formalities required by the statute were not complied with, if, from other testimony in the case, the court or jury is satisfied that the contrary was the fact." In this case the will was held good and admitted to probate. Ten years had elapsed after the transaction, and the Chancellor refers to the fact as important in estimating the character of the evidence, and the weight it should have in determining the question of due execution, and the rule laid down in the case is substantially this, that the subscribing witnesses must understand that it is the testator's will which they are attesting, and that the testator intended to admit that he had signed, sealed and published it as such.

In *Lewis v. Lewis*, (11 N. Y. 221), the will was executed in 1849 and was propounded in 1850. The witnesses therefore should have had a good recollection of the facts, and one of them did appear to have such recollection, and stated the facts with much particularity;

NORTON v. NORTON.

and it clearly appeared from the evidence that the will was defectively executed, but Judge ALLEN in his opinion says: " Mere want of recollection on the part of the witnesses will not invalidate the instrument, and, in the cases cited by counsel, the courts establishing the wills propounded have done so upon the ground that they were satisfied, from the circumstances proved, that the wills were duly executed, and that the witnesses had forgotten the facts, thus relieving the parties interested against the infirmities of humanity and the uncertainty of human recollection." A number of authorities are cited to sustain the above proposition.

The case of *Orser v. Orser* (24 N. Y., 51), is very much like the case now under consideration in many respects. One of the subscribing witnesses had died; there was an attestation to the will, stating all the particulars requisite to its valid execution and publication and signed by two witnesses; the other witness could not remember that the decedent declared the instrument to be his will, or acknowledged his signature. The only additional evidence in the case was the evidence in regard to the subscribing witness who was dead, and that simply was that it was in his hand-writing; that he was a justice of the peace, and in the habit of drawing and attesting wills.

Judge SELDEN, in delivering the opinion of the Court, says: " In the present case there were two witnesses, one of whom was dead, and the other testified upon the trial that the will was not signed or the signature thereto acknowledged in his presence, and that it was not declared by the testator to be his will. He further stated that there was conversation between the testator and the deceased witness, which he could not remember, but he was sure that nothing was said in that conversation about the will. The certificate of attesta-

tion was full, and showed, if true, a perfect compliance with the provisions of the statute; and the signatures of the testator and the deceased witness were shown to be genuine. The witness who was sworn had never before been called upon to witness a will, and knew nothing of the formalities required. Under the circumstances there can, I apprehend, be no doubt that a jury would be at liberty to find that the will was duly executed."

The statute provides, that when one or more of the subscribing witnesses are dead and the others are examined, proof may be taken of the hand-writing of the testator and of the witnesses who are dead, and also of other circumstances tending to prove the will. The effect of this provision, of course, is to make the certificate of attestation signed by the deceased witness evidence to some extent of the facts stated in it.

The case of the trustees of the *Theological Seminary of Auburn v. Calhoun* (25 N. Y., 422), decides that the publication of a will may be established upon the testimony of one of the attesting witnesses, in opposition to the other; and the case of *Tarrant v. Ware*, cited in the same case (see note) holds the same, and that the court must determine, from all of the evidence and circumstances, whether or not a doubt remains as to the direction of the statutes having been complied with.

The case of *Peck v. Cary* (27 N. Y., 9), decides that "the signature of the testator, or his acknowledgment thereof in the presence of the witnesses, and his publication of the instrument as his will, may be proved by the attestation clause and the attending circumstances, though, after the expiration of two years, none of the witnesses could testify that he saw the testator sign or heard him acknowledge his signature, nor could testify that he himself read or heard read the attestation clause, which distinctly affirmed the signature and pub-

NORTON v. NORTON.

lication in his presence. Judge DENIO, in this case says: "As to the other particulars, the seeing the signature made by the witnesses, or their hearing it acknowledged, the publication or the declaration by the testator that it is his last will and testament, and his request that they shall sign the will, these do not require or admit of any record or written memorial other than the attestation clause, and must depend upon the declaration of witnesses, and such allowances and inferences on account of want of memory may be made as the justice of the case, common experience and the rules of law present or require."

In *Willis v. Mott* (36 N. Y., 486), there were three subscribing witnesses. One of the three had died. There was the usual attestation clause. The two living witnesses testified that they did not see the testator sign the will; and one of the witnesses did not know by any inspection of the instrument whether the testator had signed it or not; the testator said he had signed it, and wanted him to witness it; the other witness testified that the testator asked him to witness a will and took the paper from a drawer and said it was his will. There was no subscription of the will in the presence of either of the two witnesses that testified, or any declaration or acknowledgment in terms that the instrument subscribed was his will. The witness to the will that was then dead drew the will, and the testator told one of the surviving witnesses that he had signed the will in the presence of the witness that was dead. The will was sustained, and Judge DAVIES, in delivering the opinion of the court, cites, with approval, *Gage v. Gage* (3 *Curteis*, 451), *Blake v. Knight* (3 *id.* 549), *Ellis v. Smith* (1 *Vesey, jr.*), *Chase v. Kitteridge* (11 *Allen*, 49). The authorities referred to each hold that it is not necessary that the witness should see the testator sign the instrument,

NORTON C. NORTON.

or that he should acknowledge the subscription in express terms, but that the will should be sustained if the evidence is sufficient to establish the fact that the will was presented to the witnesses already signed, and that the testator has executed it as his will, and that these facts may be shown by proving what occurred at the time.

In *Jackson v. Jackson* (39 N. Y. 153), the testator died soon after the will was executed. The court held that the witnesses should sign the will after the subscription, and the court was of the opinion that there was a due execution of the will, but as there was some doubt upon that point, the judgment of the Supreme Court was reversed, to enable the error to be corrected. The rule in regard to what it is necessary to prove for the purpose of showing a due execution of the will is laid down substantially the same as in the other cases before referred to.

The case of *Nixsen v. Nixsen* (2 Keyes, 229), decides that the statute only requires on the part of the testator, besides his hand and seal, the publication or announcement of the instrument as his last will and testament. This is all that is required in regard to publication, and Judge DAVIS, in his opinion upon that subject, says: "If a testator should say to the witness, I desire you to attest this instrument as my last will and testament, the language would import, not only a request but a clear publication of the will."

In *Butler v. Benson* (1 Barb, 538), the court say, "The will had been published, if at all, about ten years before the hearing. One of the subscribing witnesses has nearly forgotten the whole transaction, and the other is almost as much lost on many important points. Where the witnesses are dead, or from lapse of time do not remember the circumstances attending the attestation,

the law, after the diligent production of all of the evidence then existing, if there are no circumstances of suspicion, presumes the instrument properly executed, particularly where the attestation clause is full ;“ citing a large number of cases.

In *Cheaney v. Arnold* (18 Barb., 438), CRIPPEN Justice, in delivering the opinion of the court, says : “ If the witnesses were all dead, the proof of their hand-writing would be sufficient to establish the due execution of the instrument by the testator. After the lapse of nearly twenty-five years, unless it appears affirmatively that the will was not duly executed, the law will not set it aside or declare it invalid because the attesting witnesses do not recollect that all the requirements were complied with. A different rule would be unjust as well as unreasonable. It cannot be expected that the memory of the witnesses will retain for so great a length of time all the facts and circumstances occurring at the time of its execution. The law requires no such absurdity. “

I think the authorities referred to are decisive of this case. We are simply to declare the law, and have nothing to do with the question of the justice or injustice of the will. The evidence is sufficient to sustain the will upon the question of due execution. Had the witness Hemminway died before the proving of the will, his signature to the attestation clause could have been proved ; and that, with the other evidence, would establish this will so far as his evidence is concerned. What he remembers tends strongly to establish the will, and the other facts essential, we have no doubt transpired ; and it is simply a case where the witness, from lapse of time, and not being accustomed to such business, fails to remember what occurred.

Decree accordingly.

PIPER v. BARSE.

HERKIMER COUNTY.—HON. AMOS H. PRESCOTT, SURROGATE.—
JANUARY, 1874.

PIPER v. BARSE.

*In the matter of the Accounting of CHARLES BARSE,
Executor of the last Will and Testament, and Codicil
to the same, of TIMOTHY BARSE.*

On the question of advancement or ademption of a legacy, when raised by the executor, against the claim of the legatee, the burden is on the executor to prove satisfaction.*

When a parent procures third persons to convey property to his daughter for a consideration, moving from himself, the presumption is that it is an advancement, equally as where he makes the conveyance himself.

The circumstance that he subsequently executed a codicil, in which he made no reference to the legacy, has no weight on the question.

Testator gave a legacy of \$1,500 to each of his daughters, expressing however, in the will, his intent to pay the legacies in his lifetime. Subsequently he procured a third person, for a consideration of \$1,600, moving from testator, to convey real property to one of the legatees, declaring, at the same time, that he intended to require the daughter to give him her note for the excess of \$100, to equalize his gifts. *Held*, That this showed payment of the legacy.

THIS accounting was a proceeding in behalf of Catherine Piper, to compel the executor to pay over to her a legacy of \$1,500, which she alleged was due and payable by the provisions of the will.

The testator duly made and published his will on the 29th day of December, 1869. The third clause of the said will was as follows :

“ *Third.* I give and bequeath to my daughter, Elizabeth Aurman, the sum of fifteen hundred dollars, and to my daughter, Catherine Piper, the sum of fifteen hun-

* Where the will refers for evidence of advancement to charges, &c., in testator's books, evidence of such charges in books of a partnership of which he was a member, and that he kept no other books, is competent. (*Laurence v. Lindsay*, 7 Hun. 641.) And compare *Camp v. Camp*, post.

PIPER v. BARSE.

dred dollars ; and if not paid by myself in my lifetime, as I now intend to do, the said legacies, or so much thereof as at my decease may remain unpaid, I hereby order and direct my executrix and executor to pay out of the first moneys collected or received by them out of my estate after my decease."

On the 22d day of June, A. D. 1872, the testator duly made and published a codicil to said last will, and died soon after.

The codicil had no reference whatever to the provisions of the will, and did not in any manner affect the same.

The executor, on the accounting, appeared and claimed that the legacy to Catherine Piper had been paid by the testator in his lifetime, by procuring a conveyance to her, in 1871, of property of that value, the details respecting which are stated in the opinion.

E. GRAVES and A. M. MILLS for the claimant.

J. A. & A. B. STULE for the executor.

THE SURROGATE.—The counsel for the claimant insist, that the fact that the testator made and published the codicil above referred to, and said nothing in it in regard to the legacy to the claimant, is important, if not conclusive, upon the question of the payment of the legacy by the testator in his lifetime. I cannot see that it has any bearing whatever on the question. The testator simply makes no allusion to the subject one way or other. If he had paid it, it was necessary for him to change his will ; the legatee could demand the legacy but once ; and it can be claimed with equal propriety, that if he intended to give the Spinner lace to Mrs. Piper, aside from, and independent of, the legacy, he would have referred to it in his will.

Suppose a receipt or writing had been found among

PIPER v. BARSE.

the testator's papers after his death, showing clearly and fully that this legacy had been paid by the testator in his lifetime, would there be any doubt about its being conclusive? Certainly not.

The question, therefore, is, has the executor proved that the testator did, in fact, pay this legacy to the legatee in his lifetime? The affirmative of this proposition is with the executor, and depends upon the solution of the transaction that occurred in regard to the conveyance of the house and lot on Prospect street in the village of Herkimer, from Charles Spinner to the legatee. It is not disputed that on the 28th day of January, 1871, Charles Spinner and wife duly made, acknowledged, signed, sealed and delivered, a deed to Catherine Piper, the legatee above named, conveying to her a house and lot on Prospect street, and that the said legatee, in virtue of said conveyance, received the title to said house and lot, and now holds the same under and by said conveyance. The consideration for said conveyance was the sum of one thousand six hundred dollars, and the whole sum was paid by the testator, and the negotiations in regard to the place, and the delivery of the deed from the grantor, and the whole transaction in regard to the same, were had by the said testator, and at the time he took the deed, and as a part of the transaction, he said it was to pay Mrs. Piper, the legatee, the sum of fifteen hundred dollars; the testator saying, at the same time, it was for the purpose of making her equal with the other girls, and that each of the girls were to have, or had, \$1,500, and no more, of his estate. There is another very significant fact connected with this matter, to wit, what the testator said about the one hundred dollars. The testator paid Spinner \$1,600 for the place. He said he should require of Mrs. Piper her note for the one hundred dollars, because he did not

PIPER v. BARSE.

intend to give her more than the other girls,— that is, one thousand five hundred dollars.

In considering the question bearing upon the payment of the legacy, it is important to bear in mind that this transaction occurred quite a long time before the testator's very severe sickness, and when he was in health, comparatively speaking ;— at all events, no particular change had then taken place in the health of the testator, and nothing had then occurred to indicate any reason why the testator should at that time desire to give to this legatee any more than he had provided for in his will. The conclusion seems to be irresistible that the testator intended by the transaction referred to, to pay this legacy and nothing else ; and the language of the clause of the will, by which the testator declares his intention to pay the daughters in his lifetime, is not only quite significant of what the testator intended to do at the time he made his will, but reflects very strongly upon the transaction herein before referred to, because I can see no reason why the testator should do as he did at the time, in that transaction, unless he was carrying out the aforesaid expressed intention.

But another question arises here, which I think must dispose of the case without regard to what has been said in reference to the conveyance from Spinner, and the giving or requiring the note of one hundred dollars for the balance of the said consideration. What is the legal presumption ? It has long been held that when a parent conveys land to his child, without asking or receiving any consideration, the presumption is that the gift is an advancement ; the fact that the conveyance was made direct from Spinner and wife to the legatee does not change the rule or the transaction. The deed was doubtless made in that way to avoid the

PIPER v. BARSE.

necessity and expense of a second conveyance. There is no pretense but that the testator paid the money and transacted all of the business, and the matter must be treated precisely as though the conveyance was made to the legatee directly from the testator and without any part of the consideration being paid by her. The case of *Sanford v. Sanford* (5 Lansing, 486), and the authorities there cited, I regard as controlling and deciding this question and placing the question in such a legal aspect as to be controlling upon this court in the decision of this case.

It is true that, after the transaction of the Spinner conveyance, the testator was much out of health, and required and received the services of his daughter, Mrs. Piper, but she was amply remunerated for it by the conveyance of the house and lot, from the testator, by the deed of June 22d, 1872, which was made and executed but a short time before the death of the testator, which occurred in the month of August, in the same year. It is evident that she received that on account of the fact that her father desired to reward her for services in sickness. The conclusion to which I have arrived is, that a decree must be entered, denying the claim of the claimant to the legacy in question, adjudging and deciding that the said legacy was paid to the said legatee, by the said testator, in his life time.

Decree accordingly.

ROGERS v. ROGERS.

ORANGE COUNTY.—HON. GILBERT O. HULSE, SURROGATE.—
OCTOBER, 1869.

ROGERS v. ROGERS.

In the matter of the Final Settlement of the Estate of
JAMES ROGERS, deceased.

A direction in the will that a legacy is to be paid "as soon as conveniently may be after my decease," does not entitle it to draw interest from a time before the expiration of a year after the issue of letters.

Where there is no sufficient direction to pay the legacy before the year expires, the indication of an intent to allow interest before that time must be clear, or it cannot be allowed.

THIS was a proceeding for the final settlement of the estate of James Rogers, deceased. By the will of the deceased, he gave and bequeathed several legacies, without mentioning when they were to be paid; and to his sisters, Eliza and Susan Rogers, he gave each a legacy of three thousand (\$3,000) dollars, and directed them "*to be paid to them (his sisters) by my executors as soon as conveniently may be after my decease.*"

He appointed his son, Francis Gregory Rogers, executor, and his said two sisters, Eliza and Susan Rogers, executrices of his will. They all qualified as such.

The deceased left a large estate, amounting to considerably over two hundred thousand dollars; and at the time of his death the personal property was invested, drawing interest, and there was ample available means to pay all general legacies.

One year after the death of the testator, the legacies to the two sisters were duly paid, they at the time claiming interest thereon from the testator's death, but which the son, who had charge of the funds, refused to pay, upon the ground that they were not entitled to interest upon their legacies until at and after the expiration of

ROGERS v. ROGERS.

one year from the death of his father, or probate of his will, which question was then reserved, to be brought up on final settlement.

JAMES W. TAYLOR, *for the executors.*

D. A. SCOTT, *special guardian, for minors, and* SUSAN MARIE CELLE, *adult.*

THE SURROGATE—The question for me to decide is, shall Eliza Roger and Susan Rogers be allowed interest on their legacies from the death of James Rogers, or one year thereafter ?

At common law, when no time is fixed in the will for the payment of legacies, they are not payable until the expiration of one year from the death of the testator. This rule was for the convenience of the executor, to enable him to convert the estate into money by sales or collections, and to enable him to ascertain the amount of debts owing by the deceased, so that he could know whether there would be assets sufficient to pay the debts, it being unsafe for the executor to pay legacies in all cases before debts. (*Part 2, Redfield on Law of Wills, page 564; Cooke v. Meeker, 36 N. Y., 18; Lawrence v. Embree, 3 Bradf., 364.*)

By the provisions of the Revised Statutes of this State, no legacies are to be paid until after the expiration of one year from the time of granting letters testamentary, *unless the same are directed by the will to be sooner paid.* (2 *Rev. Stat.*, 90, § 43.) This statute is in affirmance of the common law, and has not changed the rule as to the time when interest on legacies begins to run. Though the time of payment of the legacy is fixed at one year from the date of the letters, yet interest may, in certain cases, be computed thereon from the death of the testator, and the legacy draw

ROGERS v. ROGERS.

interest from that time. (*Lawrence v. Embree* 3 *Bradf.*, 364; *Cooke v. Meeker*, 36 *N. Y.*, 18, 23.)

It is insisted by the legatees that the clause in the testator's will "to be paid to them by my executors as soon as conveniently may be after my decease," in reference to their legacies, is a direction within the meaning of the statute, express or implied, that it be paid immediately upon his decease; and although under the statute payment could not be enforced under a year, yet during the year the legacy draws interest, and that especially it is so implied, as nothing is said as to the payment of any other legacy in his will.

If this question was new, and I had for the first time to adopt a rule in a case like the present, I see no reason why, in justice and equity, the legacies in question should not draw interest from the death of the testator. The property of the deceased was all invested, and bringing in income at the time of his decease, and it continued so to do for a year thereafter. There was a large estate, and only a small indebtedness, and the interest these legacies have been drawing, unless given to the legatees, will go into the residuary.

But, if I am not mistaken, the authorities have settled the rule of law in this case against allowing interest on the legacies until the expiration of one year from the issuing of letters testamentary.

It is laid down in *Redfield on the Law of Wills* (Part 2d, page 569, § 59, Sub. 9,) that, "legacies are payable in one year from the decease of the testator, even when directed to be paid as soon as convenient;" and in Sub. 3, of same section, it is said, "it will make no difference that the executor is directed in the will to pay the legacy as soon as possible," citing: *Wood, v.*

ROGERS v. ROGERS.

Penoyre, (13 *Vesey*, 326, 333, 334); *Martin v. Martin*, (6 *Watt's R.* 67.)

In *Williamson v. Williamson*, (6 *Paige*, 299), the direction in the will, was, "to be paid as soon as convenient." WALWORTH, Chancellor, says, "As no time was prescribed in the will for the payment of such legacies, except that they should be paid as soon as convenient, the executors were right in supposing that they came within the general rule," that is, payable after the expiration of one year from the granting of letters testamentary.

These authorities, in my opinion, establish the principle, that the language used by the testator, in reference to these two legacies, does not make them payable on the death of the testator. They hold that, "to be paid as soon as possible," or, "to be paid as soon as conveniently may be after my decease," means, "to be paid at the expiration of one year from the granting of letters testamentary."

In the case of *Bradner v. Faulkner*, (12 *N. Y.*, 472), the language is, "I do also give and bequeath to my said daughter, Minerva, the sum of \$16,000, to be paid to her by my executors, out of my personal estate, as soon as the same can be collected after my decease." The Surrogate, on final settlement, decreed that Minerva was entitled to demand and receive interest on her legacy, from the death of the testator, and directed the executor to pay her the amount of the legacy, and interest from that time.

On appeal, the Supreme Court, at General Term, affirmed the decree of the Surrogate. On appeal to the Court of Appeals, the judgment of the Supreme Court was reversed. GARDNER, Ch. J., says: "As the will is silent upon the subject of *interest*, and as the statute prohibits the payment of legacies until one year from

ROGERS v. ROGERS.

the time of granting letters testamentary, and as the practice of the court prior to the statute allowed the same time to the executor, the decision of the courts below can only be justified by an express direction of the testator for an earlier payment, or by an implication from the provisions of the instrument which shall be equivalent to such direction."

In the present case, it is not claimed that there is any express direction to pay these legacies until one year from the granting of letters; and under the authorities I have been able to examine, I find no warrant or ground for an implication of that kind.

The testator must have made his will with full knowledge of the law—at all events, I am bound so to presume—and if he intended these legacies to be paid, with interest from his death, he would have said, "with interest from my decease," or words to that effect. His not doing this is a strong presumption that he did not intend the legacies should draw interest from his death. I am not to speculate as to what his intentions were; the intent that the legacy should draw interest must be clear, which is not so in this case, and the burden of proof is upon the legatees.

I must, therefore, reject the claim of interest, and let the estate pay the costs.

Order accordingly.

SIMPSON'S WILL.

ORANGE COUNTY.—HON. GILBERT O. HULSE, SURROGATE.
APRIL, 1870.

SIMPSON'S WILL.

*In the matter of Proving the Last Will and Testament
of JAMES SIMPSON, deceased.*

A will which the testator subscribed by mark may be proved, even when only one of the subscribing witnesses can be examined.

Under the provision of 2 R. S. 59. § 13, which requires that when one or more of the witnesses are examined, and the others are inaccessible &c., proof of handwriting of the testator shall be taken, and of the witnesses dead, absent or insane, and of such other circumstances as would be sufficient to prove the will on a trial at law,—evidence of such other circumstances may be sufficient, where the testator's subscription was by mark.

In such a case the testimony of the only surviving subscribing witness fully attesting all the formalities, and directly and fully corroborated by three others, who saw the testator execute the will and heard his publication and request,—*Held* sufficient.

The case of *Matler of Walsh*, (Tucker, 132,) disapproved.

THIS was an application for the probate of the last will and testament of James Simpson, deceased.

The testator died at the city of Newburgh, on the 14th day of March, 1870, having previously executed the paper now offered for probate as and for his last will and testament.

He subscribed the paper by making his mark, thus : “ James ^{his} ~~X~~ _{mark} Simpson, L. S.” Henry C. Millspaugh and Cornelius Maher were the two subscribing witnesses. Hugh Grant, James Grant and Bridget Simpson were also present at the execution of the paper by the deceased.

Cornelius Maher, one of the subscribing witnesses, was now dead ; all the others above-named were living.

Henry C. Millspaugh, the subscribing witness now living, was examined, and testified that at the execu-

SIMPSON'S WILL.

tion of the will, all the formalities of the statute were complied with; and in addition thereto, testified to facts showing that the testator was in all respects competent to devise real estate, and not under any restraint.

The other three persons above-named, who were living and were present at the execution of the will, all severally testified that they were present at the execution of the paper offered for probate; saw the deceased make his mark; heard him declare it to be his will, and request the subscribing witnesses to sign as witnesses, and saw them each sign their names as witnesses; and that the testator was in all respects competent to devise real estate.

WILLIAM J. DICKSON, *for the proponent.*

THE SURROGATE.—Having noticed the case, the matter of Walsh, before Surrogate Tucker, of the county of New York, (*Tucker's Reports*, 132), I have given this matter some little examination.

In the case above referred to, no one was present at the execution of the will except the testator and the two witnesses. The testator made his mark, and one of the witnesses was deceased. The Surrogate uses, in his opinion, this language:—"But the making of a mark has its inconveniences, as the present case demonstrates. A will subscribed by a mark, instead of by handwriting, cannot be proven at all, if one of the witnesses cannot be produced. The statute provides that where one or more, or all the subscribing witnesses are dead, out of the State, or insane, proof must be taken of the handwriting of the testator, and of the absent witness or witnesses, on propounding the will for probate. As no proof of the testator's handwriting can be given in the case, when his subscription is not made in

SIMPSON'S WILL.

handwriting, the petition for probate must be denied. It is a case, not provided for by statute."

I am not willing to follow the learned Surrogate in the case just noticed. I believe he has overlooked an important part of the section of the statute to which he refers. Sec. 13 of the statute reads as follows: "When any one or more of the subscribing witnesses to such will shall be examined, and the other witnesses are dead, or reside out of the State, or are insane, then such proof shall be taken of the handwriting of the testator and of the witness or witnesses so dead, absent or insane, *and of such other circumstances as would be sufficient to prove such will on a trial at law.*" (2 R. S. 59., § 13.)

The next section (§ 14) of the same statute reads: "If it shall appear on the proof taken that such will was duly executed; that the testator, at the time of executing the same, was in all respects competent to devise real estate, and not under restraint, the said will, and the proofs and examination so taken, shall be recorded in a book to be provided by the Surrogate, and the record thereof shall be signed and certified by him."

The Surrogate courts, as organized and existing in this State, are Courts having common law jurisdiction in all matters, therein which are not limited by some statute, and in all matters they proceed, except as aforesaid, according to the course of common law. (*Peebles v. Case*, 2 Bradf., 226; *Sipperly v. Baucus*, 24 N. Y., 46.)

The proof of a will abides by the same rules of evidence as prevail in all other judicial investigations; unless *restrained* by some express statute, the Surrogate proceeds according to the established rules of evidence.

The statute above referred to is directory only. It is not a restraining statute: it does not say no evidence other than the handwriting of the testator and absent witness shall be received; it does provide for, "such

SIMPSON'S WILL.

other circumstances as would be sufficient to prove such will on a trial at law."

What else has been done in this case. I hardly know how I can better explain this statute than by a reference to this case. Although no proof could be given of the handwriting of Simpson (the testator) we may receive the next best evidence, which has been done.

The law allows a will to be subscribed by the testator making his mark, or his name may be written by another person, at his request. (*Chaffee v. Baptist Missionary Convent*, 10 Paige, 85; *Jackson v. Jackson*, 39 N. Y. 158, 159; *Roberts on Wills*, 94; *Addy v. Griz*, Ves. 504.)

If one of the subscribing witnesses is dead, insane, or absent, and cannot be produced, the will for that reason should not fall. Resort must be had to other circumstances, such as would be resorted to, to prove the will on a trial at law. (*Peebles v. Case*, 2 Bradf. 226.)

I hold, as matter of law, that the statute is merely directory, and when one of the witnesses is out of the State, insane or dead, the other witness may be examined, and proof taken of the handwriting of the absent, insane, or deceased witness, and of the handwriting of the testator, together with any other circumstances as would be sufficient to prove such will on a trial at law; and if it so happen, as in this case, that the testator make his own mark, then you merely take the same evidence, with the exception of proving the handwriting of the testator.

The statute is directory, and does not require an impossibility. It provides for the best evidence, and if that cannot be given, then resort may be had to "such other circumstances as would be sufficient to prove such will on a trial at law."

It will not be contended, I think, that this will could not be proved in an action in the Supreme Court; and

SIMPSON'S WILL.

if I am right, that the Surrogate's Court, in matters within its jurisdiction, proceeds according to the course of common law, then I am right in receiving evidence other than the handwriting of the testator, to establish this will.

The subscribing witness must be produced, or his absence accounted for, and then the next best evidence must be produced.

A will, it is now held by the courts of this State, is to be established by the same rules of evidence as any other instrument. If the testimony of the subscribing witnesses, for any cause, fail to prove the will, then resort may be had to any other proper evidence which will establish it; which means, such evidence as satisfies the conscience of the court that the will was properly executed, and that the testator was in all respects competent to devise real estate, when such will is offered as a will of real estate as well as personal.

The evidence in this case is abundant that the will was properly executed, and that the testator was in all respects competent to make it; and it "appears to the court, upon the proof taken, that this will was duly executed, that the testator at the time of executing the same was in all respects competent to devise real estate, and not under restraint." I must therefore admit the will, and record the same, with the proofs.

Decree accordingly.

COLHOUN v. JONES.

ORANGE COUNTY.—HON. GILBERT O. HULSE, SURROGATE.—
JANUARY, 1870.

COLHOUN v. JONES.

*In the matter of the Probate of the last Will and Testament
of JOHN CLARKSON COLHOUN, deceased.*

In determining the testamentary condition of the testator's mind, the court will take into consideration the fact, though not controlling, that the will disinherits all the testator's relatives, and gives his estate to a stranger, with whom he had been acquainted but a few months.

Previous wills made by a testator are admissible on the question of undue influence, as showing that the testator was easily influenced by those who had his confidence, or that he was under the influence of a delusion.

Where it appeared that the testator's will was under the clear delusion, unfounded in fact, that his father and sister (his only heirs at law,) hated him on the ground of a difference of religious belief, that his father had treated him harshly and had driven him from home, and had refused him the means of an education, and had wanted to get him out of the way, for the sake of his property,—*Held*, evidence of monomania, or insane delusion, it appearing that the will was the direct offspring of such delusion, or was affected by it.*

A will made by a patient in favor of his physician, in whose house he resides, and under whose care he was to the time of his death, is presumptively open to the imputation of undue influence. The burden of proof is upon the latter, to show the contrary.

Fraud and undue influence may be inferred by circumstances.

THIS was a proceeding for the probate of the last will and testament of John Clarkson Colhoun, deceased.

The deceased was the only surviving son of Commodore John Colhoun, of Philadelphia. He left surviving him, his father, and Rosalie Colhoun, his only sister. His mother died in 1851. At the time of his death he was about twenty-three, and his sister about sixteen years of age. He left an estate valued at at least forty

* Compare the case of *Shaw's Will* post.

COLHOUN v. JONES.

thousand dollars. At an early age his father placed him at a boarding school at Cornwall in this state, and continued him at various institutions of learning until some time in the year 1866. In the fall of that year young Colhoun went to Europe, and returned the following spring. For a short time after his return he remained at Mount Pleasant or Chestnut Hill, near the City of Philadelphia. In the month of June, 1867, with the knowledge and approval of his father, he secured a boarding place with Mr. Daniel T. Weed, who resides near the City of Newburgh, in this county. He was in failing health at this time, and being seriously ill while at Mr. Weed's, Dr. William Jones, a physician in the City of Newburgh, was called to attend him, and made him about twenty professional visits while he was there. On the 19th of August, 1867, Colhoun left Mr. Weed's and went to Dr. Jones' house. That evening he and the Doctor went to the city of New York together. They returned in company with each other the following evening, and from that time until Colhoun's death, which occurred October 16th, 1867, Colhoun remained at the Doctor's house. The will offered for probate bears date August 21st, 1867, and purports to be the last will and testament of the deceased. It is claimed that it was executed at the Doctor's house at the time it bears date, and by its terms the testator disinherits all those who would have succeeded to his estate, in case he had died intestate, and gave the entire estate to Dr. Jones.

The following objections were filed by the father and sister of the deceased, to the probate of the will:

First. The instrument produced is not the last will and testament of John C. Colhoun, deceased, and was not executed by him in the manner prescribed by statute.

Second. That the deceased was not of sound mind and memory at the time when he executed the alleged will, and that in executing the same, he did not act without restraint.

Third. The execution of said will was procured by fraud, and by undue influence.

Fourth. At the time of executing the alleged will, the deceased was laboring under an insane delusion.

THE SURROGATE.—After a careful consideration of the testimony given before me, and an examination of the law which is to be applied to the case, I am satisfied it is my duty to reject the will.

Upon the argument before me, it seemed to be conceded by the contestants that the will was executed in due form of law. I shall therefore consider one of the objections as out of the case. The grounds on which the will is rejected are involved in the remaining objections.

The statute provides that all persons except idiots, persons of unsound mind, and infants, may devise their real estate by a last will and testament, duly executed. It also provides, that if upon the proof taken it shall appear that such will was duly executed; that the testator, at the time of executing the same, was in all respects competent to devise real estate and not under restraint; then the will and proof shall be recorded. It is not contended that Colhoun was an infant, or an idiot, or a lunatic; but it is insisted that he was so far unsound in mind, and was so entirely under the influence and control of Dr. Jones, in making the will, that the instrument is invalid.

I will first consider the question whether the testator was so far unsound in his mind that the will is invalid for that reason. He was not an idiot or a lunatic, but

COLHOUN v. JONES.

it is said that he was afflicted with a form of insanity known as monomania. Monomaniacs are those persons who are insane upon some one or more subjects, whether it relate to one or more persons or things, and are apparently sane upon all others. Such persons are competent to make a will unless the subject of their infirmity is involved in the making of it. The belief in the existence of mere illusions or hallucinations, creatures purely of the imagination, such as no sane man would believe in, is unequivocal evidence of insanity. The persistent belief of a person in supposed facts, which really have no existence, except in his imagination, and his acting upon such belief, proves him, so far as such acts are concerned, to be acting under a morbid delusion. Such a delusion is partial insanity. Whenever it appears that the will is the direct offspring of such partial insanity, it must be regarded as invalid, though the general capacity of the testator is unimpeached. The subject of monomania, or partial insanity, has been the theme of much discussion, and great weight and consideration have been given to it by the ablest medical writers and jurists. See *Dr. Beattie's Treatise on Madness*; *Locke on Human Understanding*; *Dr. Francis Willis' Treatise on Mental Derangement*; *Phillips on Lunatics, Idiots, and Persons of Unsound Mind*; *Dew v. Clark*, (3 *Addams Rep.*, 79); *Hopper's case*, (33d *N. Y. Rep.*, 624); *Stanton v. Wetherwax*, (16 *Barb.*, 259).

In considering the condition of Colhoun's mind, we are permitted to take into consideration the fact that by his will he entirely disinherits all his relatives, and gives his entire estate to Dr. Jones, with whom he had been acquainted but a few months.

This fact is not controlling evidence of unsoundness of mind, for a testator, in every respect competent, has the right to disinherit both distant and near relatives;

COLHOUN v. JONES.

yet the fact that he does so, taken in connection with other facts, may be entitled to considerable weight. (*Peck v. Cary*, 27 N.Y., 9; *Clark v. Fisher*, 1 Paige, 171.)

It is insisted by the contestants that the testator was, for many years, addicted to the vice of masturbation, and that it had resulted in breaking down his bodily health and impairing his mental faculties. That the deceased was a victim of this vicious habit there is some proof. It is not necessary for me to recapitulate it.

Dr. D. Tilden Brown, the physician for the Bloomingdale Asylum for the Insane, in the City of New York, for the past sixteen years, and Dr. John P. Gray, for the insane Asylum at Utica, for the past seventeen years, were each sworn in this case, and described patients who had come under their care from the effects of this vice, and they concur in the statement that excessive indulgence in it may, and sometimes does, destroy both body and mind. Judging from the many facts proved in this case, I have no doubt but young Colhoun was the victim of this vice, and that to its indulgence he was largely indebted for the unfortunate condition of body and mind in which he was, at the time he made the will in question.

There is another piece of testimony which is not without its importance in the case. It was made to appear that within a brief space of time Colhoun made and executed four different wills. The first was made some time prior to July 26, 1867, but it does not appear what its provisions were. The second was made while he was boarding at Mr. Weed's, and bears date July 26, 1867. By this will he gave all his property to Mr. Weed's wife, who was a comparative stranger to him. The third was made at Dr. Jones' house, on the 19th of August, 1867, but what its provisions were did not transpire on the trial, except that it was made to secure

COLHOUN v. JONES.

the Doctor. The fourth will is the one offered for probate, and is dated August 21, 1867. When considered by itself, this testimony may not be considered very important, yet it cannot but seem strange that one should execute so many wills within so short a period; and especially is it strange that within the space of one month he should make two wills differing so widely in their provisions as does the one in favor of Mrs. Weed, and that which is now offered for probate. I think the other proofs in the case justify the conclusion that Colhoun's condition of mind was such that he was easily influenced and controlled by any one who had the fortune to secure his confidence. Or it may be that these many wills were but the natural results of the delusion under which it is claimed the testator labored with regard to his father.

The testimony given on the trial, showing that Colhoun harbored intensely hostile feelings towards his father, at the time he executed the last will, is very strong. It is unnecessary to quote it at length, but it is sufficient to state that the fact was established by numerous witnesses. He justified this hostility on various grounds. He charged that his father and sister were Catholics—that his father hated him because of his Protestant faith, that his father had treated him harshly—that he had driven him away from home—that he had refused to aid him in getting an education—that they had not been on good terms for a number of years—and his father wanted to get him out of the way, so that he could get hold of his property, &c. It was clearly shown that there was no foundation for any of these charges, and that no reason existed why the testator should have entertained any of these beliefs against his only surviving parent. That the testator believed in the truth of what he said I have no doubt; that the facts which he asserted

COLHOUN v. JONES.

had no real existence is equally clear to my mind; and that the will was the direct offspring of the delusion, no one can deny. We therefore have the precise condition of the monomaniac, as shown by the evidence of Drs. Gray and Brown, who concur with the most enlightened and able medical writers on the subject.

Dr. Gray testifies: "An insane delusion is the belief in the existence of that which has only an existence in the imagination of the person. It is the result of disease."

It was shown that as late as the month of July, 1867, and while young Colhoun was boarding at Mr. Weed's, he saw his father in the City of New York. They met and parted on the most friendly terms. It appears that immediately afterwards, young Colhoun conceived the idea that his father was, and long had been, an enemy to him. He is at this time in ill health. He declares that his father shall never have any of his property. He believes in the truth of the charges he makes against him, against all evidence. He makes a will disinheriting his father, on the express ground that he believed in the facts which had an existence only in his imagination. He was laboring under what may be termed an insane delusion, or partial insanity. The authorities are clear that whenever a will is the direct offspring of such a delusion, or rather, where its provisions are affected by it, the instrument is invalid. Believing as I do, that Colhoun was laboring under an insane delusion in regard to his father, and that he was controlled by it in making the will in question, I refuse to admit it to probate for that reason.

I will next consider whether the testator was the victim of undue influence, or rather whether he was under restraint in making the alleged will.

This is the case of a will made by a patient in favor

COLHOUN v. JONES.

of his physician ; and a strong presumption arises against its validity. The case has not been relieved from such presumption by the testimony ; but on the contrary, all the facts and circumstances proved, tend to strengthen and confirm it. It is necessary that a person standing in the confidential relation which Dr. Jones occupied to the testator, should, when he comes into court, seeking to establish such an instrument as this, show honest motives and fair dealing, and that no advantage had been taken by him of one who was so completely in his power. This Dr. Jones has failed to do. Instead of showing fair dealing, and rebutting the presumption which arises against the will, the testimony of the Doctor, and of the other members of his family, is of such a character as to force me to the conclusion that Colhoun was completely under the doctor's control and influence, and that the doctor exercised that control and influence to make himself the sole beneficiary under the will. How or in what particular way this was done, does not distinctly appear. It is true that fraud and undue influence must be proved ; but they may be inferred and established by circumstances. If they are not established in this case, by the circumstances which surround it, then I think it difficult to conceive of one in which it could be done, except by direct and positive testimony.

It is well to advert to a few facts under this branch of the case. Colhoun boarded at Mr. Weed's, from June 11th, until August 19th, 1867. During that time Dr. Jones, with whom the deceased had no previous acquaintance, was called to attend him as his physician, and made him some twenty professional visits. While making these visits, the doctor learned that Colhoun had property to a large amount, and frequently talked with him on the subject of making a will. He knew of the execution of the Weed will, and was informed that his

COLHOUN v. JONES.

patient had willed his entire estate to Mrs. Weed. He soon after persuaded his patient to stay at his house for a few days, and immediately afterwards boasts to one of the witnesses that he had succeeded in getting him from Mr. Weed's. On the very day following, Colhoun leaves Mr. Weed's, and goes again to the doctor's house. He at once makes a will in the doctor's favor. That evening they go to the City of New York, in company with each other, and the next day are found at the office of Colhoun's attorney, getting information concerning Colhoun's estate. They return to the City of Newburgh, on the evening of that day, and again Colhoun goes to the doctor's house. The following day the will offered for probate is drawn and executed, and the first one made in the doctor's favor is destroyed. The precaution is taken to have two medical gentlemen, Drs. Kerr and Mills, friends of Dr. Jones, witness the execution of the last will. The executors named in it are strangers to the testator, but old acquaintances of the doctor. From that time, Colhoun is taken charge of, and watched day and night, by Adolphus Jones, who is a son of the doctor, and who had full knowledge of the making of the will.

After the fact of Colhoun's whereabouts and condition became known, many of his friends and acquaintances called to see him, but were either denied admission or admitted with reluctance. Notwithstanding Dr. Jones well knew who Colhoun was, where his father resided, and that his patient must soon die, he never thought it worth his while to make known to the father the condition of the son, until it was too late to remove the patient from his house, or to undo what had been done. And when Commodore Colhoun, after being notified by the doctor that Clarkson was about to die, called, in company with Judge Taylor, to see him, the

COLHOUN v. JONES.

doctor questioned the propriety of letting him go to the bedside of his dying boy.

Other facts might be referred to, but these are sufficient to justify the conclusion that Dr. Jones acquired and exercised complete control over his patient. He knew Colhoun's condition, and it is plain to me, that having become aware of the execution of the will in favor of Mrs. Weed, he induced the testator to leave Mr. Weed's and take up his residence with him, and to make the will offered for probate.

A will made by a patient in favor of his physician, under the circumstances proved before me, cannot be said to have been made without restraint. The law presumes that the will was procured by undue and improper influences, and there certainly is nothing in the facts of the case which repels that presumption. (2 *Milne and Craig*, 269; 1 *Redf. on Wills*, 513-534; *Dean v. Negley*, 41 *Penn.* 312; *Gilneath v. Gilneath*, 4 *Jones Eq.*, 142; *Wilson v. Moran*, 3 *Bradf.* 172; *Swinburne on Wills*, part 7, chap. 4; *Willard's Equity Jur.* 169, *et seq.*; *Dent v. Bennett*, 7 *Sim.*, 539.)

The case last cited has a peculiar analogy to the one under consideration.—There an agreement was entered into between Dent, a man of eighty-six years of age, and Bennett, his physician, whereby the latter agreed to render him faithfully his medical services, whenever required during the lifetime of the patient, for which, and for other services, Dent agreed that Bennett should have £25,000 at his decease, payable out of his estate. After the death of his patient, the physician brought an action against the executor on the agreement, and the latter filed a bill to restrain the suit at law, and to set aside and have cancelled the agreement, on the grounds that it had been obtained from a man of advanced age, and without advice, and by the undue influence of the

COLHOUN v. JONES.

physician over his patient. The Vice-Chancellor, in his opinion, used the following language :

" I must say, that from the beginning it has struck me with very great surprise, that any one who had the power of withdrawing such a case as this from the attention of the public should have allowed it to be discussed in public. In my opinion, however, as the case now stands, nothing can be more useless than to allow the action (at law) to proceed ; for it is plain on the face of the agreement, that it is not worth one farthing in point of law. * * It is an agreement framed on the foundation of having the medical assistance of the defendant continued, and not on the ground that the connection between the two as patient and medical adviser is to be dissolved. It is plain that the existence of such an agreement is a direct premium to the medical adviser to accelerate that death upon the happening of which he is to have £25,000. * * * And it seems to me, that wherever you find the relation of employer and agent existing in situations in which, of necessity, much confidence must be placed by the employer in the agent, then the case arises for watchfulness on the part of the court that that confidence shall not be abused ; and I can hardly conceive a more glaring instance of the abuse of confidence, than the taking by Mr. Bennett, in the manner represented in his answer, this sort of agreement from Mr. Dent."

I feel that I am fully sustained by this case. The case under consideration shows a still greater necessity for adhering to the rule laid down in *Dent v. Bennett*. Here the patient was ill, and went to the house of the physician, where he made the will, and never left that house after the will was executed. During all this time he was under the direct influence of Dr. Jones, who, to quote the language of the Vice-Chancellor, in the case

MATTER OF GOODRICH.

last cited, had a direct interest "to accelerate that death on the happening of which" he was to get a large estate. Authority, reason, and conscience, alike dictate the conclusion I have arrived at to reject the will, upon the ground that at the making thereof the testator was under restraint, as well as upon the other ground, to wit, partial insanity.

Decree accordingly.

ORANGE COUNTY.—HON. GILBERT O. HULSE.—SURROGATE.—
JUNE, 1870.

MATTER OF GOODRICH.

In the matter of the final settlement of the estate of CLARINDA B. GOODRICH, deceased.

Under a bequest of a "residue to be equally divided between my two sons," naming them, but adding, "should the two sons die before they become 21 years of age then" a gift over to others,—the gift to the sons is vested, subject only to be divested by the death of both sons before attaining majority.

If one only should attain majority, the gift to the other would not lapse by his death in minority, but his share would go to his heir or next of kin.

A bequest of a fund, "part to the Bible Society, part to the Home of the Friendless, part to educate poor who wish to be evangelical ministers of the gospel, when they are thought to be qualified, and bid fair for usefulness, and for such religious purposes as the conference thinks best to appropriate it,—" is void for uncertainty.

THIS was a proceeding for a final settlement of the estate of Clarinda B. Goodrich, deceased.

The only questions arose upon the construction of the following clauses in the will of the decedent.

After giving some specific articles and two small legacies, he proceeds: "I direct that my executor do sell

MATTER OF GOODRICH.

all my real estate and personal property not hereinbefore bequeathed, and after paying my legal debts incurred during my life and by my death, and settling my estate, the residue to be equally divided between my two sons, John K. and Ariel E. Goodrich. Should the two sons die before they become twenty-one years of age, then I do "give and bequeath to my niece Caroline V. Colden, five hundred dollars (\$500). And in aforesaid case for sister Laura's benefit, one thousand dollars (\$1,000), to be controlled by David Crawford Houston, for her benefit, according to his best judgment.

Sixthly :—And in said case, I give and bequeath to my two sisters, Amanda Sellick and Harriet N. Peet the sum of five hundred dollars (\$500) each.

"All the rest and residue to go for religious purposes, part for the Bible Society, part for the Home of the Friendless, part to educate poor who wish to be evangelical ministers of the Gospel when they are thought to be qualified, and bid fair for usefulness, and for such religious purposes as the conference thinks best to appropriate it."

She then appointed her executor.

D. F. GEDNEY, *for the executor*.

THE SURROGATE.—The two sons take all the property when they respectively become twenty-one years of age. If they both die before attaining to the age of twenty-one years, then the legacies will go to the niece and sisters, and for religious purposes, unless the clause in relation to religious purposes is void for uncertainty or indefiniteness.

Before the niece, sisters, and the religious objects can possibly take, both John R. and Ariel E. Goodrich must have died before either had attained to the age of twenty-one years. (1 *Jarm. on Wills*, 756 ; 1 *Redfield on Wills*,

MATTER OF GOODRICH.

439-440, 488-489; *Dillon v. Harris*, 4 *Bligh*, R. N. S., 321.) In case one of the sons attains the age of twenty-one years, he is then absolutely vested with the gift, and entitled to be paid his half of the rest and residue so given to him.

If one dies before attaining the age of twenty-one years, and the other attains to that age, the share of the one dying will go to his personal representatives. The share of the one so dying will not lapse because the event in which he could not take, has not happened, to wit, the death of both sons. (*Willard's Eq. Jur.*, 513; *Beekman v. Bonsor*, 23 N. Y., 298).

I do not find any authority for holding a lapse in case of the death of one of the sons before 21 years of age, when the other son attains that age.

The gift is absolute to the two sons, to be equally divided. No time is fixed for the payment. The law fixes that, making it payable upon their respectively attaining the age of twenty-one years. There is only one condition which will subject the legacies to lapse, and that is "should the two sons die before they become twenty-one years of age." They are vested legacies, subject to be divested by the death of both sons under 21 years of age.

The next question is, what becomes of the estate in the case of the death of both sons before 21 years of age? This question as to part of the estate is easily answered.

Five hundred dollars is to be paid to Caroline V. Colden or her personal representative. One thousand dollars is to be paid to Daniel Crawford Houston, as trustee for Laura. Five hundred dollars each to her sisters Amanda Sellick, and Harriet N. Peet, or to their personal representatives.

The balance of estate will lapse by reason of uncertainty.

EDSALL v. WATERBURY.

The bequest to the Bible Society is void for uncertainty, for who shall say what part it shall take. The same remark will apply to the bequest to the Home of the Friendless, moreover it does not designate the institution nor its location. (1 *Jarm. on Wills*, 316-317; *Jubber vs. Jubber*, 9 *Sim.*, 503; 1 *Redf. on Wills*, 671, *Pl. 5. and cases.*)

That the bequests "part to educate the poor who wish to be evangelical ministers of the gospel, where they are thought to be qualified and bid fair for usefulness"; "and for such religious purpose as the conference thinks best to appropriate it" are void for uncertainty, I need hardly argue or cite authority.

The balance of the estate, then, after taking out the legacies of \$500 to the niece, \$1,000 to her sister Laura, and \$500 each to her sisters Amanda Selleck and Harriet N. Peet, will go to the testatrix' next of kin in the same manner and proportions as if she had died intestate.

Decree accordingly.

ORANGE COUNTY.—HON. GILBERT O. HULSE, SURROGATE.—JUNE, 1871.

EDSALL v. WATERBURY.

In the matter of the final accounting of JAMES E. WATERBURY, executor of the Last Will of RICHARD B. EDSALL, deceased.

Under a gift to A. of the interest to accrue on all testator's estate during A.'s life, "and at her death to be distributed as follows: the sum of \$1,000, to B." &c. the executor is by implication, trustee of the fund during the life of A.

A gift to testator's wife made, and by her accepted, in lieu of dower, does not preclude her claim to share in a surplus of personality undisposed of by the will.

EDSALL v. WATERBURY.

The fact that the surplus is only a remainder after the termination of a life estate, given to the widow herself, does not alter the case. The right to the shares in remainder undisposed of by the will vests on the testator's death, in the widow and next of kin, by force of the statute of distributions, although such shares are not payable till her death, when her share will be payable to her personal representatives or next of kin.

THIS was a proceeding for the final settlement of the accounts of James E. Waterbury, executor of the last will and testament of Richard B. Edsall, deceased.

The decedent by his will disposed of his property as follows, viz :

First : I give and bequeath to my wife Anna Edsall, the interest that may accrue on all my estate, both personal and real, during her natural life, to be accepted and received by her in lieu of dower or right of dower, and at her decease to be distributed as follows :

The sum of one thousand dollars to my daughter Mary Catherine Drew.

The sum of one thousand dollars to my daughter Sally Harrison.

The sum of twenty-five dollars to each of my grandchildren James E. Rhodes and Anna Rhodes.

The sum of one hundred dollars to each of the surviving children of deceased daughter, Eliza Rickey.

It appeared from the account filed by the executor upon this settlement that there came into his possession personal property of the deceased, amounting to \$15,315.23, that he owned no real estate at the time of his death, and that there was to be deducted and allowed to the executor, for expenses of administration, funeral expenses, debts &c., the sum of \$2,970.25, leaving a net balance of \$12,344.88.

DURYEA & BACON, *for the executor.*

D. F. GEDNEY, *for ANNA EDSALL, widow.*

SHARPE & WINFIELD, *for the children and grandchildren.*

EDSALL v. WATERBURY.

THE SURROGATE.—The first question presented is, who is to have charge of the fund during the life of the widow? It may be noticed that the will makes no provision in this respect.

I have examined the law upon this point and have come to the conclusion that the executor in such case is the trustee. I have had considerable difficulty in reaching this conclusion, and do so upon the trust implied in law and from the intent of the testator, relying upon the following authorities (*Covenhoven v. Shuler*, 2 *Paige*, 122; *Clark v. Clark*, 8 *Paige* 160).

The next question is, did the decedent die intestate as to the balance, after taking from the \$12,344.88 the above named legacies?

There seems to be a balance of nearly \$9,000, which is not disposed of by the will.

At common law, the whole personal estate upon the death of a testator, devolved upon his executor; and if, after payment of the funeral expenses, testamentary charges, debts and legacies there was any surplus, it would vest in him beneficially. And in equity *prima facie* the rule was the same as at law. But this rule was controlled in all cases where a necessary implication or strong presumption appeared that the testator meant to give only the office of executor, and not the beneficial interests in the residue. In all such cases the executor was considered the trustee for the next of kin of the testator, or, in cases where no next of kin could be found, as trustee for the crown. (*Will. on Ex.* 1327.)

But now, by statute, the rule is changed, and where there is a will, the surplus remaining after the payment of the debts and legacies, if not bequeathed, is to be distributed to the widow or next of kin of the deceased. (2 *R. S.* 98, § 75.)

I find no difficulty therefore in deciding this question.

EDGALL C. WATERBURY.

Here is a balance belonging to this estate of about \$9,000 which the decedent has not bequeathed or disposed of, and the statute above cited makes it my duty to order it distributed to the widow, children, or next of kin.

The will provides that the widow shall have the accrued interest and income of the whole estate during her natural life, to be received by her in lieu of dower or right of dower, and I am asked to decree that she take none of the undisposed part of said estate. But I have no authority to do that. The testator is presumed to know the law, and he made this will, as I must presume, knowing that she would share in the portion not bequeathed by him. I cannot say she shall not participate in the distribution when the statute says she shall.

Again, it is objected that she cannot have her share of this portion not bequeathed during her natural life, and she could take none after her death. To this the answer is that the share of the widow in the unbequeathed portion vests immediately upon the death of her husband, and she may will or otherwise dispose of it during her life, to take effect in possession upon her death.

I think the case upon this point is precisely like the case of *Sweet v. Chase*, (2 N. Y. 73) where a legacy of \$400 was given to the widow, to be paid out of the real estate of the testator, and he gave the use of all his real estate to his widow, during her natural life, and upon her death, he directed his executor to sell his real estate. It was held that the legacy of \$400 vested in the widow. She married again and died, after which the real estate was sold and enough realized to pay everything, including this legacy, and her husband brought suit as her representative, for the \$400, and he recovered; the Court of Appeals sustaining the recovery.

SWARTWOUT v. SWARTWOUT.

I cannot distinguish these cases. The legacy in the case cited vested on the death of the testator, but was not payable until after the death of the widow. In the case at bar the distributive share vested in the widow, upon the death of Mr. Edsall, but is not payable till after her death, and then only to her personal representatives or next of kin.

Let the decree presented by the executor herein conforming to these views be entered of record.

Decree accordingly.

ORANGE COUNTY.—HON. GILBERT O. HULSE, SURROGATE.
JULY, 1871.

SWARTWOUT v. SWARTWOUT.

In the matter of the guardianship of HARRIET E. SWARTWOUT, ISABELLA SWARTWOUT, and GEORGE H. SWARTWOUT, *minors.*

A widow judicially appointed guardian of her own children may be removed, upon her re-marriage.

It seems that the re-marriage terminates such a guardianship.

THIS was a petition to remove Harriet E. Swartwout from the guardianship of her children.

Henry B. Swartwout, a resident of the town of Deerpark, in this county, died possessed of about \$15,000, in personal estate, and a farm of about 180 acres, upon which at the time of his death, he resided. He left him surviving, his wife Harriet E. and their children, Harriet E. Isabella, and George H. All of the children were still under fourteen years of age.

Harriet E. was duly appointed the administratrix of his personal estate, and she as such settled her accounts

before the Surrogate of this county, and upon the 28th day of May, 1867, a decree was entered in the Surrogate's office directing her to retain in her hands the shares of the personal estate of the said Henry B. Swartwout, deceased, due to each of said children, amounting to about, in all, \$9,000, until a general guardian should be appointed, when she was ordered to pay said shares over to such guardian, and upon the 3rd day of May, 1869, she was duly appointed such guardian by the said Surrogate.

In December, 1869, the said Harriet E. intermarried with one Watson Space, by whom she subsequently had one child. She and her three children occupied the farm left by the decedent until her said marriage with Space, and he with her and the children thereafter continued to occupy it.

Application was made by James D. Swartwout, uncle of said Henry B. Swartwout, as a friend of Henry's children, and in their behalf, for the removal of Harriet E. now Harriet L. Space, as guardian, alleging as grounds the said intermarriage with said Space, and certain alleged misconduct of the said guardian.

DURYEA & BACON, *for the petitioners,*

DANIEL FINN, *for the guardian.*

THE SURROGATE.—At common law, an unmarried female, otherwise competent, may make as valid contract as a male, and could in like manner be guardian of minors, because she was as free to act as a male, but upon her marriage she ceased to be the free agent she was before; and she in law could make no contract whatever, without the consent or sanction of her husband—she was under his control. This rule was in time somewhat modified, so that, after marriage, with the consent of her husband, she might be appointed administratrix, and her husband

SWARTWOUT v. SWARTWOUT.

was liable for her acts, but this rule was never made applicable to guardians. (*Woodruff v. Cox*, 2 *Bradf* 153, *Bunce v. Vander Grift*, 8 *Paige*, 37.)

Therefore, when even a mother was guardian of her children and re-married, her guardianship ceased, because she was no longer competent to make a contract, and was under the influence of her new husband, and perhaps another reason may be added,—that of the probability of other children and the partiality that might be shown by the stepfather. There are other reasons, no doubt, within the observation of all, why the guardian in such a new relation should be removed. (*Lee v. Gowatt*, 1 *Bradf.*, 346; 2 *Bradf.*, 155; *Newhouse v. Gale*, 1 *Redfield*, 217.)

Whatever may have been formerly the power of this court to remove for this cause (marriage), the statute of 1837 invested it with such power. (*Laws* 1837, p. 530, § 34.)

There is no application before me for the appointment of a new guardian in this matter, but it is strenuously insisted by the counsel for the guardian that the laws of 1867 authorize her to be continued as guardian, or rather does continue her such guardian.

I do not agree with the counsel. The statute authorizes the Surrogate to appoint a married woman executrix, administratrix and guardian, and married women are declared therein to be capable to act as such, as though they were single woman, and their bonds given upon the granting of such letters are to have the same force and effect as though they were not married. (2, *Laws* 1867, p. 783, § 2.)

This act is one simply permissive; it makes a married woman competent. It removes her common law disability and declares her capable to act. She may give a bond the same as if she were sole, which shall be legal

YOUNG v. CASE.

and as valid as if single ; but the statute does not continue the trustee, and the question involved in this matter is untouched.

But if the statute last cited did authorize or continue the guardianship, I am very much inclined to remove Mrs. Space for other reasons which have been laid before me by evidence, but the conclusion at which I have arrived saves the discussion of that question.

Let an order be entered removing Harriet E. Space, formerly Swartwout, as guardian of her children by Henry B. Swartwout, deceased, upon the appointment of a new guardian for said children, and let her account to such new guardian.

Order accordingly.

ORANGE COUNTY.—HON. GILBERT O. HULSE, SURROGATE.—SEPTEMBER, 1871.

YOUNG v. CASE..

In the matter of the final accounting of ELIZABETH CASE and GEORGE W. NEWMAN, executors, &c., of WILLIAM CASE, deceased.

A gift of all testator's estate real and personal to "my daughter E., and my grandson W. (after the death of my wife), to have to their own proper use, share and share alike," vests on testator's death : and on the death of one of the legatees, before the death of the widow, his share goes to his next of kin.

THIS was a proceeding for the final accounting of the estate of William Case, deceased.

The testator died at the town of Hamptonburgh in Orange County on the 19th day of December, 1868, having previously thereto executed his last will and testa-

YOUNG v. CASE.

ment which was duly proved and admitted to probate by the Surrogate of said County, on the 30th day of March, 1869. Elizabeth Case and George M. Newman qualified as executrix and executor thereof.

He left him surviving Jane Case, his widow, who died on the ninth day of August, 1871, Elizabeth Case, above named, his daughter, Sarah Jane Moore, a daughter who has since died, and Sarah J. Dickinson, daughter, and William C. Young, a son by a daughter then deceased.

William C. Young died within the county on the eighth day of August, 1871, intestate and unmarried, leaving him surviving his father James A. Young (who is a lunatic now confined in a lunatic asylum, for whom Silas C. Young is the committee) his only heir at law, and next of kin.

William Case gave all his property, real and personal, to Jane his wife, during the term of her natural life. After the death of his wife, he gave his *real estate* to his daughter Elizabeth, and his grandson, William C. Young; and the *personal estate* he gave as follows: "I give and bequeath all my personal estate of what kind soever to my said daughter Elizabeth, and my said grandson William C. Young, (after the death of my wife) to have to their own proper use share and share alike."

William C. Young having died before Jane Case, the widow, (some 24 hours before her) the question arose as to whom the share given to him went, or whether by reason of his death, before the death of Jane Case, the gift to him *lapsed*.

DILL & ROYCE, for the Executors.

DURYEA, BACON & DURYEA, for SILAS C. YOUNG.

THE SURROGATE.—The general rule is well settled

YOUNG v. CASE.

that where the legatee dies before the testator, the legacy will lapse (2 *Redfield on Wills*, 484 ; 2 *Williams on Executors*, 1084).

But the statute of this state saves the legacy given to a child or other descendant who shall die in the lifetime of the testator leaving a child or other descendant (2 *R. S.* 66 § 52 ; *Van Beuren v. Dash*, 30 *N. Y.* 393.) William C. Young did not die before William Case the testator. He was a descendant, but the statute has no application to the case, as he died after William Case and left no child or descendant him surviving, so that the question rests upon the common law.

It seems to be well settled that a gift to one for life and after his or her death to another, vests in both immediately upon the death of the testator. The life tenant will enjoy the gift for life, and upon the death of the life tenant, the remainderman comes into possession ; it is the enjoyment only that is postponed. (2 *Redfield on Wills*, 506. (32) ; 1 *Jarman on Wills*, 750 : 4 *Madd. R.*, 411 ; *Hulme v. Hulme*, 9 *Sim.*, 644 ; *Conklin v. Moore* 2 *Bradf.*, 179 ; *Arcularies v. Geisenhainer*, 3 *Id.*, 75 ; *Laroque v. Clark*, 1 *Redfield*, 471.)

In *Williams on Executors* this rule is laid down : "When a person bequeaths a sum of money or other personal estate to one for life, and *after his* decease to another, the interest of the second legatee is vested, and his personal representatives will be entitled to the property, though he die in the lifetime of the person to whom the property is bequeathed for life." (2 *Williams on Ex.*, 776 ; *Barker v. Woods*, 1 *Sandf. Ch.*, 131.)

This rule I find sustained by every reported decision I have met with, and the same rule must be applied here.

William C. Young, died after the testator (William Case), and the share given to him by the will of William Case became vested in him immediately upon the

WELLS v. WALLACE.

death of William Case, but the enjoyment thereof was postponed until the death of Jane Case, widow of William and although William C. Young died before Jane (the widow) and could not enjoy the testator's bounty, still it belonged to him, and upon the death of Jane Case, his father James A. Young as heir at law, and next of kin, became entitled to the possession of his share.

A decree must therefore be entered directing the share given to William C. Young, to be paid to Silas C. Young, the committee of the said lunatic James A. Young.

Decree accordingly.

ORANGE COUNTY.—HON. GILBERT O. HULSE, SURROGATE.—
SEPTEMBER, 1871.

WELLS v. WALLACE.

In the matter of the petition of E. A. WELLS, trustee, in the accounting of HANNAH WALLACE and JOHN J. COOPER, administrators of HARVEY WALLACE, deceased.

The Surrogate has jurisdiction upon the petition of one who received no notice of an accounting had by executors or administrators, to open the decree made on such accounting.

Where a trustee died insolvent, having wasted the fund, and his administrators accounted without notice to the *cestui que trust*, and obtained a decree requiring them to pay the trust claim only *pro rata* with general creditors.—*Held*, that the Surrogate had jurisdiction to open the decree, on the petition of a substituted trustee, without notice to the heirs, next of kin and creditors.

Presentation by the substituted trustee of the claim to be allowed the full amount, is not necessary in such case, the administrators having had actual notice of the claim after testator's death, and having accounted before a substituted trustee.

Upon the death of the trustee of an express trust of personal property, as well as where the trust is of real property, the trust devolves upon the Supreme Court.

WELLS v. WALLACE.

If it appear that the trust fund was so mixed by the trustee with his own property that it cannot be separated or identified, it must be paid *pro rata*, as the creditors of the trustee are paid.

THIS application was made in the matter of the accounting of Hannah Wallace and John J Cooper, administrator of Harvey Wallace, deceased.

William Wallace, deceased, by his last will and testament appointed his son Harvey Wallace, also now deceased, his executor. He gave to his said son \$2,000 to be invested by him, and the use thereof he gave to his daughter Matilda, during her life, and such portion of the principal as in the judgment of Harvey should be necessary for her support and maintenance.

The will of William Wallace after his decease was proved, and Harvey qualified as the executor thereof, and acted as such up to April, 1869, when he died intestate and insolvent.

Hannah his widow, and John J. Cooper, were appointed his administrators, and John C. Wallace, before the accounting herein mentioned, was appointed administrator with the will annexed of the goods and chattels of the said William Wallace, deceased, left unadministered by the said Harvey. The administrators of the goods, &c., of the said Harvey Wallace, deceased, subsequently rendered their account as such, notice of which was given to the said John C. Wallace, but no notice thereof was given to the said Matilda.

Upon their rendering said account, the settlement thereof, was attended by the said John C. Wallace, and the account allowed and settled as filed; and as settled, a decree was entered directing the said administrators of the estate of the said Harvey Wallace, deceased, to pay to the said John C. Wallace, the portion of the said trust fund, treating the same as a debt of Harvey, to the trustee of said fund.

WELLS v. WALLACE.

By the account rendered as aforesaid, there appeared in the hands of Harvey Wallace, at the time of his decease, the sum of \$1,610 principal, and \$184.47 interest, belonging to the estate of William Wallace, deceased; and this sum on said settlement of the administrators of Harvey Wallace, deceased, or such portion thereof as his estate would pay (treating it as other debts of H. Wallace) was directed to be paid to John C. Wallace, as administrator, with the will annexed of William Wallace, deceased.

Subsequent to the entry of the decree upon the said settlement of the administrators of Harvey Wallace, deceased, Matilda Wallace, the *cestui que trust*, or person entitled to the use of the \$2,000, provided for in the will of William Wallace, deceased, applied to the Supreme Court for, and obtained an order, appointing Edgar A. Wells, trustee of said fund of \$2,000; thereupon said new trustee, (E. A. Wells,) applied to the Surrogate by petition praying that the decree made the settlement of Hannah Wallace, and John C. Cooper, administrators, &c., of Harvey Wallace, deceased, might be opened and corrected, by directing that the whole money remaining in the hands of Harvey Wallace, at the time of his death belonging to the estate of William Wallace, be paid over to him, the said Edgar A. Wells, trustee.

The matter came before the Surrogate on an order requiring the administrator to show cause why the petition should not be granted.

W. B. ROYCE, *for the petitioner.*

DURYEA & BACON, *for the administrators.*

THE SURROGATE.—It is objected by the counsel for the administrators that I have no power, jurisdiction or authority to alter, open or correct or amend the decree made upon the accounting.

WELLS v. WALLACE.

This objection must be overruled. I have no doubt of the Surrogate's jurisdiction and authority so to do, and think in a proper case he ought so to do.

It is objected further that I have no power or jurisdiction except upon notice to the heirs at law, next of kin, and creditors of the said Harvey Wallace.

This objection I shall also overrule. I think the trustee need only call upon the administrators for the fund. It is not necessary that any others have notice of this proceeding.

It is objected further that the Surrogate has no power or authority to decree payment to said Edgar A. Wells without having proof that he had presented the claim to the administrators, and that its validity was allowed.

I do not see the force of this objection. The claim to the amount of \$1,610.86 and interest, is not disputed. The administrators had notice of the claim and admitted it to that amount. Nothing further was needed, but at that time there was no trustee to present the claim to, if a presentation was necessary, and no advantage can be taken when notice is in fact given. This answers all the objections filed. I think that whenever an error has been committed, the Surrogate on application upon notice may correct the same. It is only necessary for me to decide these objections. Whether the decree will be opened depends upon other questions, but the objection to my jurisdiction and power to open a decree of my own entering must be overruled.

The petition was consequently heard upon the merits.

DURYEA & BACON, *for the administrators.*

DILL & ROYCE, and D. F. GEDNEY, *for E. A. WELLS, the trustee.*

WELLS v. WALLACE.

THE SURROGATE.—Two questions are submitted for my decision.

1st. Upon the death of Henry Wallace, trustee of the fund of \$2,000 under the will of William Wallace, deceased, upon whom did the trust devolve? Shall the administrator with the will annexed, John C. Wallace have it, or Mr. Wells, the trustee?

Upon this question I meet with various opinions of judges and opposite decisions. It is held in three cases which are cited below that the statute of uses and trusts does not apply to a trust of personal property. (*Kane v. Gott*, 24 *Wend.*, 641; *Savage v. Burnham*, 17 *N. Y.*, 561; *Bunn v. Vaughan*, 1 *Abb. Ct. App. Dec.*, 253.

The revised statutes of this State have not defined the objects for which express trusts in *personal* estate may be created, but have done so as to *real* estate, and the statute of uses and trusts as to express trust of real estate provides, that upon the *death* of the *trustee* the trust shall *devolve* upon the Court of Chancery, (now Supreme Court). But section 2 of title 4, chap. 4th, 1st part of the revised statutes, provides as follows: "In all other respects limitations of future or contingent interests in personal property, shall be subject to the *rules prescribed* in the first chapter of this Act in relation to future estates in lands;" and one of those *rules* is, that upon the death of the trustee, the trust devolves upon the Supreme Court.

I am unable to see how we are to read the above statute otherwise than that it applies to trusts in either real or personal estate; and, conclude in my own judgment, that upon the death of Harvey Wallace, the trustee under the will of William Wallace, the trust devolved upon the Supreme Court, and that Edgar A. Wells is now, by virtue of the appointment by that court, the trustee of the said trust fund.

WELLS v. WALLACE.

I am not alone in this conclusion, for I find the Court of Appeals, in another case, have, I think, come to the same conclusion. (*Campbell v. Foster*, 35 N. Y., 361, 371-2, and cases there cited. See also, *Hawley v. Ross*, 7 Paige, 103, 107 ; a case precisely in point.)

This disposes of the first question. But I will remark, that in some of the cases it is held or intimated that the *administrator with the will annexed* (John C. Wallace) is entitled to this fund. The case in 1 Abb. Ct. App. Dec., 253, holds, that upon the death of the trustee the trust devolves upon his representatives. John C. Wallace is not the representative of Harvey Wallace.

2d. It being conceded that Harvey Wallace in his lifetime used this fund with his own in business, and so mixed it with his own as to become undistinguishable, and could not be identified from his funds,—has the trustee a claim superior to that of a general creditor of his deceased ?

The parties have stipulated as to the facts upon which this question depends; they have stipulated that the amount of the funds in the hands of the administrators of Harvey Wallace, belonging to the estate of William Wallace, deceased, to wit, the said sum of \$1,610 and interest, is the unexpended portion of said trust fund of \$2,000, and that it was not kept separate from his own funds, but was by him used and mixed with his own money in business, &c.; by which admission, I conclude that the administrators of Harvey Wallace find from his books this balance of \$1,610 and interest, which appears to be the unexpended portion of the \$2,000 trust money; but they fail to find any investment of the same, and find that it is a part and portion of his property, owned by him at his death, he having used and mixed it with his own money in his business, &c.

WELLS v. WALLACE.

At first this question might appear to be in favor of the trustee; but I find, upon reflection, that the reason and justice of the principle involved is with the creditors.

The making of a trustee is the voluntary act of the party creating the trust. It is the confiding of your property to another to do with as you may will or direct. The court is not asked to aid you. The trustee is of your choosing; and it is the person choosing the trustee who is at fault, for the whole matter is with him. He may require the trustee to give security. But where a person makes a testamentary trustee of a trust estate, and no security is required, if the trust is for the benefit of some third person, the person beneficially intended may make complaint to the court in case the trustee is squandering the trust funds, or for many other reasons; and the court will remove the trustee, or require him to give security, as the case may be. It is not often that a trustee is called to an account; and no one knows except himself, one case in a hundred excepted perhaps, how he is handling the trust or what he has it invested in. Take this case. Matilda Wallace was a sister of Harvey; she was of age, and competent to look after her own interest; yet she contented herself by asking her brother for some money when she would or wanted it, and while she was so contented and confiding toward that brother, he was using her trust fund in speculation in stocks, when he was made bankrupt.

Even if she knew her brother was not keeping the fund separate from his own money, she would be very reluctant in requiring him to give security, or to offend him about the fund their father had entrusted him with by his last will and testament. But such is one's privilege; and if the trader squanders the money, he has betrayed the confidence reposed in him.

WELLS v. WALLACE.

The trust, in case of the death of the trustee, devolves upon the Supreme Court, and in order to carry out the trust, it will affirm a person as trustee, and this will not be done unless the person gives suitable and proper security.

It is a great hardship for the *cestui que trust* to lose the beneficial intent by the wrongful act of the trustee. It is also a hardship for a creditor to lose his money.

Suppose a poor widow with a large family of small children had loaned to Mr. Harvey Wallace say \$2,000, all the money she had. We might suppose that Matilda herself had loaned her brother \$2,000, of money given her by her father. In either case it would be a great hardship to lose the money, or most of it, yet the lender certainly would. The substituted trustee, in this case, has no greater or superior claim, in my opinion. The trust money having been used by Harvey in his business, proves, upon his death, to have been either lost in speculation or mixed with his own funds in the property left by him. He has, perhaps, obtained credit by using this fund, and creditors are entitled to share in his estate.

I will refer for the reasons of the rule to *Barlow v. Yeomans* (50 Barb., 187).

I confidently hope enough may yet be realized from the estate of Harvey Wallace to nearly pay all in full.

I decide, that upon the death of the trustee of an express trust, whether of real or personal property or both, the trust devolves upon the Supreme Court, and,

2d, That it appearing that the trust fund was so mixed by the trustee with his own property that it cannot be separated or indented, it must be paid *pro rata*, as the creditors of the trustee are paid.

The application to appear and amend the decree

MATTER OF ADAMS.

herein must be granted so far as to be made to conform to the views above expressed.

A reasonable allowance will be made to both parties for their costs, on application therefor.

Decree accordingly.

ORANGE COUNTY—HON. GILBERT O. HULSE, SURROGATE.—
NOVEMBER, 1871.

MATTER OF ADAMS.

*In the matter of the Final Settlement of the Estate of
LEVI B. ADAMS, deceased.*

The Surrogate has power to adjudicate upon all questions arising from acts committed by executors, administrators, or guardians who are subject to his jurisdiction.

He may, upon an accounting, compel the executor or administrator to account for property transferred to him by the decedent while living, in fraud of his creditors.

The decedent, in his lifetime, transferred a bond and mortgage to a third person, who transferred it to the decedent's wife, in fraud of his creditors, and died, leaving a will appointing her executrix with other executors. The bond and mortgage was not entered in the inventory, because he had parted with the title to it. *Held*, that on final settlement of the accounts, the Surrogate had power to compel the executrix to account for the value.

THE deceased, Levi B. Adams, in his lifetime was the owner of a bond and mortgage for \$4,000, which, a short time before he died, was by him duly assigned to a third person, and by him transferred to the wife, now the widow of the deceased.

Upon the settlement of his estate, it appeared that at the time he transferred this bond and mortgage he was insolvent, and indebted to the creditors on the majority of them appearing in the Surrogate's Court.

The bond and mortgage was not inventoried, for

MATTER OF ADAMS.

the reason that the deceased had parted with the title to the same in his lifetime.

It was admitted by the widow that there was no more than a partial consideration for the transfer, and no consideration moved from the third party, the object of the deceased being to transfer this bond and mortgage to his wife.

The creditors of the deceased now claimed that the widow, who is one of the executors of the last will and testament of the deceased, should account for the bond and mortgage, at least to the amount of their claim. To this she objected, and by her counsel claimed that this court had no jurisdiction to adjudicate upon the question, because she did not receive the bond and mortgage as executrix, and that the Surrogate had no power to try the question of fraud, which it was insisted necessarily arose in the case.

H. A. WADSWORTH, *in person and as executor.*

CHAS. H. WINFIELD, *for MRS. ADAMS, widow.*

D. F. GEDNEY, *special guardian, for minors.*

B. R. CHAMPION, *for creditors.*

THE SURROGATE.—There is no doubt that Surrogate Courts have jurisdiction and power to adjudicate upon all questions arising from acts committed by executors, administrators, or guardians, as such. But the transfer of this bond and mortgage, being an act done before she was executrix, and by the testator, in his lifetime, raises a different and more difficult question.

Creditors and others interested in the estates of deceased persons, have a right to appear and be heard on the settlement of the accounts of executors and administrators, before the Surrogate, and they may show that the executor or administrator has failed to account for all the property of the deceased ; and it is the duty

MATTER OF ADAMS.

of this court to compel them to account for all the property of the deceased, which the law requires them to take charge of and to account for.

On behalf of the creditors of the testator, was this bond and mortgage the property of the wife or of Mr. Adams, after its transfer and before his death? His death intervening, I do not think changes the character of the transaction. Clearly it was his. The law will not tolerate such acts of an insolvent debtor. The person to whom the transfer is made, will be trustee for the creditors.

Mrs. Adams being such trustee, and also executrix, and this court having obtained jurisdiction of the subject matter, and of the person of the executrix, has it not the power, and is it not its duty, to compel her to account for the bond and mortgage, or so much thereof as will satisfy the claims of the creditors?

A man cannot give his property to his wife or other persons, to the exclusion of creditors existing at the time of the gift. (2 *Rev. Stat.*, 140, § 1.)

The law declares the act of Mr. Adams fraudulent only so far as creditors are concerned; and if these creditors should bring an action in the Supreme Court, against Mrs. Adams, to account for the bond and mortgage, there would be no answer to their action. A bare statement of the facts would entitle the creditors to a judgment. I see no reason why this court cannot determine this question. The only parties interested are in court, and no question of fraud is to be determined as a question of fact. The law determines the question of fraud upon the facts; and I have only to declare the law applicable to the case.

Of course I must determine from the evidence the character of the transaction, and will receive evidence upon the matter if offered.

Decree accordingly.

 LARROUR v. LARROUR.

STEBEN COUNTY.—HON. GEORGE T. SPENCER, SURROGATE.—
FEBRUARY, 1872.

LARROUR v. LARROUR.

*In the matter of the accounting of ALBERTUS LARROUR,
one of the executors of the Last Will and Testament
of FRANKLIN LARROUR, deceased.*

An executor or administrator cannot be allowed for expenditures incurred after the decedent's death in stocking or carrying on a farm left by the decedent, or in operating a mill owned by himself and the decedent as tenants in common, in the absence of clear evidence that the expenditures were beneficial to the estate.

In such a case, expenditures not necessary in the proper administration of the estate, or, in execution of specific powers in the will, should be disallowed: and, on the other hand, credits of moneys not proceeding legitimately from the assets or estate, should be stricken out.

But charges for threshing grain if done to prepare for sale, or market, grain raised by the decedent, are proper; so of taxes assessed against him in his life time.*

Where the widow was a co-executrix, and had assented to improper expenditures, but was also guardian for minor heirs and next of kin, and had not expressly assented in that capacity,—*held* that though she could not, as executrix, object to their allowance to her co-executor, she could do so as guardian.†

In such case, the Surrogate should appoint a special guardian for the purposes of the accounting.

Where such expenditures exhausted the personalty before the debts were fully paid, and necessitated a sale of realty to pay debts,—*held*, that they could not be treated as payments made to the guardian.

On taking an account before an auditor, contestants are to be required to point out with reasonable certainty the grounds of objection to the claims of the executor or administrator; but they are not restricted to the objections first taken.

Where minors are interested, objections taken on their behalf even on the final argument after the evidence is closed, should not be excluded as waived.

* Otherwise where fee or even remainder after termination of a life estate is bequeathed to executor in trust. (*Peck v. Sherwood*, 56 N. Y., 615.)

† *S. P. Jennings v. Jones*, post 95.

As to effect of judgment obtained against an infant by neglect of guardian *at litem* to plead infancy, see *Phillips v. Dusenberry*, (8 Hun, 348.

LARROUR v. LARROUR.

THIS was a proceeding to settle the accounts of Albertus Larrou, one of the executors of the last will and testament of Franklin Larrou, deceased.

Albertus Larrou, one of the executors of the last will and testament of Franklin Larrou, deceased, filed his accounts for final settlement. Amanda M. Larrou, widow of the testator, and co-executrix of the will, also the general guardian of two minor children of the testator, who were the residuary legatees and devisees under the will, appeared and contested the accounts in her own behalf, and as guardian of the minors. The accounts were referred to an auditor for adjustment, upon the coming in of whose report, a motion was made on the part of the executor to confirm the same, and on the part of contestants, exceptions were filed to various items, allowed as credits to the executor.

The facts which present the questions arising upon the exceptions, appear in the opinion of the Surrogate.

C. F. KINGSLEY and D. RAMSEY, *for the executor.*

A. HADDEN and WM. B. RUGGLES, *for the contestants.*

THE SURROGATE.—The will of the deceased, after directing that the dwelling house he is building should be enclosed, and that a sufficient quantity of his real and personal estate should be sold, to pay and discharge all claims against his estate, gives the residue of his property, both real and personal, (subject to the lawful rights of his wife), to his two children who are minors. No other trust or power, except as above, is created or granted by the will. Amanda M. Larrou, his wife, is appointed executrix, and Albertus Larrou executor, both of whom have qualified as such.

The personal property, it appears, was insufficient to pay the debts, and several parcels of land have been

LARROUR v. LARROUR.

sold by the executors, the proceeds of which properly appear in the accounts.

The executor, Albertus Larrou, in his accounts presented for settlement, charges the estate with various sums for expenses incurred since the death of the testator in purchasing stock for, and in carrying on, the farm, owned by deceased in his lifetime, and in operating a saw-mill which belonged to him and deceased as tenants in common.

The auditor, to whom this matter was referred, has, in his report, allowed charges against the estate, of the character above specified to the amount of about two thousand dollars.

These charges are contested by the widow in her own behalf, and by the minor legatees and devisees, through her as their general guardian, on the ground that they did not accrue in the due and proper administration of the estate, or the proper discharge of duty of the executor.

It is claimed on the part of the executor, in answer to the objections made to these charges, that though not strictly legal, the expenditures they represent have been beneficial to the estate and were incurred at the request, or with the assent, of the widow and executrix, who is also the general guardian of the minors; and also that the specific objections now insisted on, were not taken before the auditor until the argument on the final hearing after the evidence had been closed.

In regard to the first of these grounds, it is not clear that the expenditures have been beneficial to the estate. The will requires sufficient of the personal and real estate to be sold, to satisfy all claims and debts against the testator. It does not authorize the purchase of farming stock, or the cultivation of a farm, or the operating of a saw mill; the general authority of the execu-

LARROUR v. LARROUR.

tor does not extend to the expenditure of money for any of these purposes. In consequence of such expenditure, a larger burthen of the debts has been thrown upon the real estate than would have otherwise been necessary. The auditor, in his report, allows the executor's charges against the estate after making certain specified deductions to the amount of \$13,487.13. This sum includes about \$2,000, made up of items which accrued in the transactions above referred to. It does not appear, so far as I can discern, that any considerable portion of the latter sum is represented by a corresponding increase in the amount or value of the assets of the estate. If this sum is deducted from the amount allowed to the executor there will be left less than \$11,500 of legitimate charges against the estate, and had the assets in the hands of the executor been faithfully applied for proper purposes only, these charges might have been nearly satisfied out of the personal property. Instead of this, however, a large amount of real estate has been sold, the proceeds of which remains in the hands of the executor; this method of administration is not only contrary to law, but clearly defeats the intention of the testator as expressed in his will, and cannot be sanctioned or sustained. (*Stedman v. Feidler*, 20 N. Y., 446; *Willcox v. Smith*, 26 Barb., 316.)

The widow having assented to the unauthorized expenditure, and being in *pari delicto* with the executor is not in a condition personally to avail herself of these objections. Perhaps also, as the general guardian of the minors, she might be treated as having given her assent in that capacity, and left to account to them at the proper time for the waste of their estate. But, in my opinion, they are not bound by her acts in this respect, and should not be left to seek redress at a future day for what can be prevented now.

LARROUR v. LARROUR.

Upon this accounting, the widow as executrix has an interest apparently adverse to that of the minors. It would have been proper for the Surrogate to appoint a special guardian for the purpose of taking care of their interests. Had this been done, it clearly would have been the duty of such guardian to raise the objections now made; and it can scarcely be claimed, as it seems to me, that any act of the general guardian as such, or in her capacity of executrix, in assenting to a violation of his trust by the executor, would constitute a good answer to such objections: indeed, if the position of the general guardian is now such that she is precluded from raising objections to the allowance of illegal and unauthorized charges against the estate, it is the duty of the Surrogate to open the whole matter and appoint a special guardian for them for the purposes of this accounting. (*Dayton on Surrogates*, 469; *Brick's Estate*, 15 *Abbotts Pr. R.* 12-40.)

The suggestion that the unauthorized expenditure may be treated as a payment to the guardian out of the estate to which they are entitled is not entitled to consideration; the whole personal property was exhausted in the payment of debts and the legitimate expenses of administration. The authority of the executors over the real estate ceased with sale of sufficient thereof to complete the payment of claims and debts against the estate; they had no power to sell the same, or any part thereof, for the purpose of distribution. What the executors had no power to do, the guardian was not authorized to assent to. And since most, if not all, the objectionable charges are for purposes in no wise connected with the legitimate administration of the estate, or any trust or power created by the will, and do not represent money or property paid or delivered to the guardian as such, there is no ground for the claim that they can be disposed of as a payment to the guardian.

LARROUE v. LARROUE.

It is to be inferred from the auditors report, that he justified his allowance of the charges in question, not only on the ground of the assent of the co-executrix, but upon the further ground still insisted on by the executor, that the specific objection of want of authority in the executors to incur such charges, was not taken till the final argument before him, after the evidence was closed, and was thereby waived. I cannot regard this position as well founded, especially as these were minors whose rights ought not to be compromised. It is certainly the proper practice to require parties contesting the accounts of an executor or administrator, to point out, with reasonable certainty wherein they are claimed to be erroneous. The contestants, however, are not absolutely precluded by the objections first made; as it is frequently discovered in the course of the investigation that charges have been improperly inserted in the account, or credits to the estate have been omitted by the executor or administrator which the adverse party had no means of knowing when the account was first presented. (*Gardner v. Gardner*, 7 Paige, 112; *Westervelt v. Grigg*, 1 Barb. Ch. 469, 479; *Dayton on Surrogates*, 473.) When fresh objections are raised in the progress of the hearing, and they are such as may be obviated by evidence, the matter may be kept open by the auditor or the Surrogate, for the purpose of receiving such evidence.

My conclusion is, that the charges of the executor against the state for expenditures other than those which were necessary in the proper administration of the assets in his hands, or in execution of the powers specifically conferred by the will, should not be allowed.

On the other hand, money credited to the estate not proceeding legitimately from the assets or estate in his hands should be stricken from the accounts.

MATTER OF GLANN.

Among the items specified by the auditor as having accrued after the death of the testator in unauthorized farming and other operations, are several charges which may have been legitimate. Of this character are the charges for threshing grain in February, 1863. If this work was done to prepare for sale or market, the grain which was raised by testator the previous season, it was an expense incurred in the proper course of administration. So if the taxes paid in January, February, and March, 1863, were assessed against the testator in his life time, it was the duty of the executor to pay them.

I have not noticed several of the exceptions to the report, because they are either disposed of by the question already decided, or I am unable from the report or the evidence to make a satisfactory settlement, without a further hearing. If the parties cannot agree upon a settlement upon the basis indicated in this opinion, they may have a further hearing before me, or the matter may be referred back to the same or another auditor for settlement in accordance with this decision.

Ordered accordingly.

STEBEN COUNTY.—HON. GEORGE T. SPENCER, SURROGATE.—
MARCH, 1872.

MATTER OF GLANN.

In the matter of the application of the administrators of the estate of DREW GLANN, deceased, for leave to lease, mortgage, or sell, his real estate for payment of debts.

On application for leave to dispose of real property for payment of debts, the Surrogate cannot pass on claims presented against the estate by the heir or devisee, and disputed by the executor or administrator. His authority as to disputed claims is limited to those resisted by the heir or devisee.*

* S. P., Burnett v. Kincaid, 2 Lansing 320

MATTER OF GLANN.

An order was made in this proceeding for the sale of real estate of the decedent for the payment of his debts. On the application of certain of the heirs, the order was opened to enable them to contest the application of assets by the administrators, and the validity of the debts on account of which the sale was applied for. On the hearing, at the time appointed for that purpose, the contestants proposed to establish claims of their own against the estate which was objected to by the administrators.

G. H. McMASTER, *for the contestants.*

A. HADDEN, *for the administrators.*

THE SURROGATE.—An order for the sale of the real estate of Drew Glann deceased, for the payment of his debts, was opened on the application of certain of his heirs, to allow them to contest the administrators' account of assets coming to their hands, and the validity of the debts allowed by them against the estate.

These grounds of contesting the proceedings of the administrators seem, however, to be now abandoned, and the contestants seek to establish a claim, or claims, of their own against the estate for about six hundred dollars and interest, which it is alleged was received by the intestate in trust, to be distributed amongst them, and now constitutes a debt due to them.

The claim has never been presented to the administrators, and they now deny its validity, and resist its allowance.

Claims disputed or rejected by the administrator, must be established, if at all, by a suit or by a reference pursuant to the statute. The power of the Surrogate in this proceeding, and at this stage of it at least, is limited to passing on such claims as are contested by the heir or devisee, and does not extend to deciding

STEWART'S WILL.

upon claims which an disputed or rejected by the administrator (2 R. S. 102 § 10; *Magee v. Vedder*, 6 Barb., 352.)

For this reason, without reference to the merits of the claim, the order to open the hearing is vacated, and the administrators allowed to proceed with the sale.

Order accordingly.

STEBEN COUNTY.—HON. GEORGE T. SPENCER, SURROGATE.—
JANUARY, 1874.

STEWART'S WILL.

*In the matter of the probate of the Last Will and Testament
of ANDREW STEWART, deceased.*

Testimony of one of the subscribing witnesses to the will; corroborated that before the witnesses signed, the testator answered in the affirmative to an inquiry whether the instrument which he had subscribed was his last will, and testament. *Held*, sufficient evidence of publication prior to attestation, though contradicted by the other witness.

It appeared that the testator had declared to the draftsman that he had selected such persons who in fact became witnesses, for that purpose and had requested them to be sent for; and after he subscribed, they were directed to sign, the testator moving away from the table where he had signed while they were looking on. There was also evidence of prior publication. *Held*, that these circumstances sufficiently proved request.

The reading of the attestation clause, in testator's presence, even after it has been signed by the witnesses, is sufficient evidence of his request to sign, recited in it.*

THIS was an application for the probate of the last will and testament of Andrew Stewart, deceased. The will related to both real and personal property. Its admission to probate was contested on two grounds:

* As to sufficiency of evidence of publication and request, compare *Thompson v. Stevens* (62 N. Y., 634).

STEWART'S WILL.

first, that it was not duly executed, and second, that the will was procured by undue influence.

G. H. McMASTER, *for the proponent.*

A. J. McCALL, *for the contestants.*

THE SURROGATE.—As to the second ground of contest the proof falls entirely short of establishing any undue, or indeed, any influence inducing the dispositions made by the will, other than the promptings of the testator's own feelings and judgment. This branch of the case, therefore, may be dismissed without further consideration.

The objection to the sufficiency of the proof of execution of the will requires more consideration.

The alleged defects in the proof, are that there was no publication and no request to the subscribing witness.

The first defect is founded on the assumption, that the declaration of the testator that the instrument was his will was not made till after the same was signed by the witnesses. This assumption, however, is unfounded. The witness, M. Chesney, says, that the draftsman of the will enquired of the testator if that was his last will and testament, to which the latter answered, that it was, and that this was before he and the other witness signed. The draftsman also testifies to his impression to the same effect. To this is opposed the recollection of Lane, the other subscribing witness. • The weight of evidence is in favor of the conclusion, that the declaration was made before the witness signed. The signing by the testator was certainly first, and if to this is added the formal attestation subscribed by the witnesses, stating the fact of due publication, the preponderance of evidence in this respect is quite decisive.

There was certainly no express request by the testa-

BRINK v. LAYTON.

tor to the subscribing witnesses personally, but it has often been held that such request may be implied from the acts and conduct of the parties and surrounding circumstances. (*Peck v. Cary* 27 N. Y. 9; *Gilbert v. Knox* 52 N. Y. 125.) In this case the testator declared to the draftsman who prepared the will, that he had selected the persons who in fact became witnesses to the same, for that purpose, and requested to have them sent for. They were sent for in pursuance of the request; after the testator had signed, the witnesses were also directed to sign, the testator moving away from the table, when he had signed, while they were looking on. If he had before, in answer to the question put to him, acknowledged the paper as his will, there can be little doubt that they understood him as desiring them to witness it as such, and that he intended to be so understood.

I am further of the opinion, that the reading of the attestation clause signed by the witnesses, stating that they subscribed by request of the testator in his presence, without objection from him, may be regarded as an adoption of a request to that effect, though, subsequent to the signing by them. This view is not opposed to *Jackson v. Jackson*, (39 N. Y. 153.) The will must be admitted to probate.

Decree accordingly.

STEBEN COUNTY.—HON. GEORGE T. SPENCER, SURROGATE.—
MAY, 1874.

BRINK v. LAYTON. .

*In the matter of the final accounting of ISAAC LAYTON,
administrator, with the Will annexed, of SARAH
BRINK, deceased.*

An absolute direction in the will to sell real property, since it affects an equitable conversion from the time of testator's death, is inconsistent

BRINK v. LAYTON.

with a right of dower in the widow; and she should be put to her election, whether to take a share of the proceeds of conversion or to claim dower.*

An agreement between the beneficiaries under a will to hold and treat the real estate as such, notwithstanding an equitable conversion effected by an absolute direction in the will to sell it, cannot affect the right of succession of the heirs of the beneficiaries nor the dower right of a wife married to a beneficiary before the agreement was made.

The decedent was one of a number of heirs and beneficiaries under a will who in her life-time had agreed upon a settlement of their interest in their ancestor's estate, pursuant to which a bond and mortgage had been taken by the decedent in her own name, but in fact for the benefit of another beneficiary whose share was thus invested. *Held*, that the fund was properly paid over to the latter by the administrator of the former.

Such a settlement must be as binding upon one of the parties to it as upon the others; and the transaction having been in an individual capacity, any mistake must be corrected by action, and not on the accounting in the Surrogate's court.†

Where the administrator in good faith paid a claim of \$300 for services to the decedent, which was presented verified in the usual form, and the evidence before the auditor tended to substantiate it:—*Held*, that it must be allowed.

THIS was a hearing, upon exceptions on the part of Burnett M. Brink, a residuary legatee under the will of Sarah Brink, deceased, and claiming also as creditor, and of John J. Brink, claiming as creditor, to the report of the auditor upon the final accounting of Isaac Layton as administrator with the will annexed of the deceased.

The will of Sarah Brink gave all her property, after payment of her funeral expenses and debts, to her grand daughter Sarah Bedell and her grandson, Barnett M. Brink, one of the contestants, to be divided equally between them. The executor named in the will having died before the testatrix, Isaac Layton was appoint-

* For the most recent cases as to the doctrine of equitable conversion see *Graham v. Livingston*, (7 Hun., 11); *Denham v. Cornell*, (*Id.*, 662).

† As to power of heirs to compromise, see *Gilman v. Gilman*, (6 *Suprm. Ct. T. & C.*, 211).

BRINK v. LAYTON.

ed administrator with the will annexed. The accounts of the administrator, having been filed for a final settlement, were contested, and thereupon were referred to an auditor for adjustment.

Exceptions were now taken to his report thereon in substance.

1st, to the allowance of a payment made by the administrator to Sarah Bedell for moneys claimed to have been held by the testatrix in trust for her, paid and charged in the account, to the amount of \$2,685, but allowed by the auditor to the extent only of \$766.35.

2d, to the allowance of a claim of \$300 to Delos R. Bedell, for services rendered the testatrix in her life time.

3d, to the rejection of a claim of Burnett M. Brink of \$2,298.88 for his interest in real estate derived from Abram V. Brink, deceased, which had been sold and the avails of which had been received by the testatrix, including rents and profits before the sale, and interest on the avails, and,

4th, a like claim for a like amount in favor of John J. Brink.

G. H. McMASTER, *for the administrator with the will annexed.*

P. BURNETT, *for the contestants.*

THE SURROGATE.—In regard to the two latter questions, it is sufficient to say that the claims having been rejected by the administrator, the Surrogate has no authority to allow them. The remedy of the claimants was to consent to a reference or bring suit.

There is no evidence tending to impeach the good faith of the administrator, in the payment of the claim of Delos R. Bedell. It was verified in the usual form by the claimant, and the evidence before the auditor tended to substantiate its validity and correctness. It was properly allowed.

BRINK v. LAYTON.

The question of one payment to Sarah Bedell, is a complicated one, and requires a statement of the history of her claim. This arises indirectly under the will of Matthew Brink, who died November 9, 1844, whereby, after payment of his debts, he gave to Sarah Brink, his widow, whose estate is in question here, one third of all his property; to Abram V. Brink, his son, a legacy of \$800, which he declared had already been paid; to Lucinda Sanford, his daughter, a legacy of \$800, of which he declared \$200, had been paid; to Dennis P. Brink, his son, a legacy of \$1,100; and the residue to the above three legatees, his only children, to be equally divided between them. The will directed all the property to be sold and disposed of as above provided. At the death of the testator, he had personal property amounting to about \$1,500, and a farm of one hundred and fourteen acres of land.

Lucinda Sanford died May 2, 1844, before the testator, but after the making of the will, having a husband, David R. Sanford, one of the executors, and two daughters, Irene and Sarah, now Sarah Bedell, one of the parties to this proceeding. Irene died in 1846, unmarried and without issue, leaving her father, David R. Sanford, and her sister Sarah surviving her. David R. Sanford, died in 1847. Abram V. Brink, died in 1847, leaving no widow, but three children. Sarah R. Brink, Burnett M. Brink, and Judson A. Brink.

Sarah R. Brink, died in 1859, unmarried and without issue, leaving her brothers Burnett M. Brink, and Judson A. Brink, surviving her.

Judson A. Brink, died in 1869, leaving a widow, Janette Brink, and a son, John J. Brink, who is a party to this proceeding.

Dennis P. Brink, died in 1850, unmarried and without issue.

BRINK v. LAYTON.

On May 3d, 1847, a final settlement was had before the Surrogate, of Matthew Brink's personal estate, on the application of Dennis P. Brink, the then surviving executors, and the amount remaining, after payment of debts, \$1,147.90, distributed as follows: one third to the widow, Sarah Brink, and the balance between Sarah Sanford, and Dennis P. Brink, in proportion to the amount unpaid on their respective legacies: the widow receiving \$382.93½, Sarah Sanford, \$269.99½, and Dennis P. Brink, \$494.97½.

The real estate was not sold by the executors as directed by the will, and both of them having died, the parties claiming an interest in the same, with the exception of Burnett M. Brink in 1865, made an arrangement to have the same sold, and the proceeds distributed according to their respective rights. These parties were Sarah Brink the widow whose estate is the subject of this accounting, Sarah Bedell, daughter of Lucinda Sanford and Judson A. Brink, son of Abram V. Brink. The land was sold for \$10,000, of which \$2,000 was paid in cash, and the balance \$8,000 secured by bond of the purchaser and mortgage on the premises. The shares of the respective parties were agreed upon as follows: of Sarah R. Bedell, \$3,418.83, of Burnett M. Brink and Judson A. Brink, \$1,709.41 each, and of Sarah Brink, the widow, the balance, \$3,162.36. This settlement included as well the interest derived directly under the will of Mathew Brink, as that to which the parties were entitled out of the estate of Dennis P. Brink and Sarah R. Brink. It was a provision of the settlement, that the widow should relinquish her right of dower in consideration of being discharged from liability to account for the rents and profits of the real estate, which she had occupied from the time of the testator's death. It does not appear whether or not any account was made of the

BRINK v. LATTON.

balance unpaid of the legacies to Lucinda Sanford and Dennis P. Brink.

The sum assigned to Judson A. Brink was immediately paid to him, and he gave his receipt in full for his interest in the estate of Mathew Brink, and of Dennis P. Brink. Burnett M. Brink subsequently received a like sum, and gave a similar receipt. The amount to which Sarah Bedell was entitled, it was agreed should be kept invested in the bond and mortgage given for the purchase money of the farm, and taken in the name of Sarah Brink, till the same should be paid, which bond and mortgage were outstanding: at the death of the latter, Sarah Bedell, however, had been paid the interest and \$1,000, of the principal of her share, leaving about \$2,500, due her, which was the basis on which the administrator paid her claim.

If this settlement and adjustment was intended to be made according to the strict rights of the parties, and there were no elements in it except such as are disclosed, they evidently proceeded upon an error of calculation, or of law, or of both. Indeed there was probably an error of law in assuming that the widow of Mathew Brink was entitled to dower, and also in treating the proceeds of the farm as real estate and to be disposed of as such. It is further quite likely that the amounts unpaid of general legacies to Lucinda Sanford, and to Dennis P. Brink, were considered as having abated.

The direction to sell the real estate for the purpose of the dispositions made by the will was "out and out" and resulted in the equitable conversion of the same into personal from the time of the testator's death (*Stagg v. Jackson*, 1 N. Y., 206, 212). This direction and the dispositions made by the will, are entirely inconsistent with the right of the widow to dower, and she was put to her election. It was impossible that the real estate

BRINK v. LAPTON.

should be sold for distribution in which she should have one-third, and that she should at the same time have dower in the same real estate. (*Savage v. Burnham*, 17 N. Y., 561; *Tobias v. Ketchum*, 32 N. Y., 319; *Vernon v. Vernon*, 53 N. Y., 351.) All the beneficiaries under the will take as legatees and not by way of devise. On the death of Irene Sanford, her father was entitled to her share of the legacies, both general and residuary, given to Lucinda Sanford, (2 R. S. 96. § 75 sub. 7;) the interest of Sarah R. Brink belongs to her brothers Burnett R. Brink and Judson A. Brink (*Ib. sub. 5*); the share of Dennis P. Brink should have gone to his mother Sarah Brink, to Sarah Bedell as the representative of Lucinda Sanford, and to Sarah R. Brink, Burnett M. Brink and Judson A. Brink, as representative of Abram V. Brink (*Ib. sub. 6. 10*). Before the death of Judson A. Brink his widow was entitled to one-third of his interest and his son John J. Brink to the balance.

So far, no notice has been taken of a receipt given by Sarah Sanford to Sarah Brink, referred to in a written opinion of the counsel who was consulted as to the rights of the parties interested in Mathew Brink's estate. This opinion, doubtless, was followed in the settlement. The receipt, which was without date, was for \$1,000 in full of all the interest of Sarah Sanford in the estate of Mathew Brink, and in the legacy bequeathed by his will to her mother Lucinda Sanford. This, the counsel advised, was a good discharge of the pecuniary legacy, but not of any interest in the real estate; assuming that the latter retained its character as such, notwithstanding the directions of the will for its conversion. Whether this opinion, if acted upon, was correct or not, I do not regard as material, for the reason, as will appear, that the settlement was so far binding on Sarah Brink that it cannot properly be opened in an accounting upon her estate.

BRINK v. LAYTON.

It was perhaps competent for the beneficiaries under Mathew Brink's will, notwithstanding the directions to sell, by agreement or consent to hold and treat the real estate as such, so long as no other rights intervened, but certainly the personal representatives of David R. Sanford, and the widow of Judson A. Brink, if she had married him before the settlement, and perhaps others, had interests which could not be affected by that arrangement.

The auditor, in his report, decides that while Burnett M. Brink and John J. Brink, as the representatives of Judson A. Brink are concluded by a receipt of the sum assigned to them in the settlement, as to the sums so received, they are not concluded as to the amount agreed upon as the share of Sarah Bedell, in the estate of Mathew Brink and Dennis P. Brink. I am unable to see the ground or the justice of this position. If this distribution was made by agreement, either entered into before, or ratified afterwards, it is equally binding on all, as on one. The reason given for re-adjusting the share of Sarah Bedell, that the sum remained unpaid at the death of Sarah Brink, so far from being ground for a readjustment, is a reason against it. The share of Sarah Bedell, by the arrangement that it should remain in the bond and mortgage, vested as completely in her as the money paid to the other parties. And if Sarah Brink were alive, she might be able to show more satisfactorily than can now be made to appear, all the considerations which entered into the settlement. If the sum claimed to have been overpaid to Sarah Bedell, should not now be allowed to the administrator, it would properly belong to the estate of Mathew Brink, to be administered as such. In making the payment the administrator in legal effect, executed the trust reposed in Sarah Brink. But in treating the interest

CORNWELL v. DECK.

of Sarah Bedell as a debt of Sarah Brink and paying it as such, the result is the same.

As the sum paid to Sarah Bedell was so paid in pursuance of an agreement and settlement made by the parties interested, in their individual character, if there was any mistake, which is the subject of correction, this is not the proceeding in which to seek the remedy, even if this is the tribunal to afford it. The decree in this case can be made, if necessary, saving the rights of any of the parties claiming to have been injured, in consequence of any mistake or error in the settlement of the estate of Mathew Brink.

The result of these views is, that the full amount of the payment to Sarah Bedell should be allowed in the administrator's credits to himself, and the report of the auditor in other respects confirmed.

Order accordingly.

STEBURN COUNTY.—HON. GEORGE T. SPENCER, SURROGATE.—
OCTOBER, 1874.

CORNWELL v. DECK.

In the matter of the accounting of LUCILLA CORNWELL, administratrix of the goods, &c., of ABIAH CORNWELL, deceased.

An administrator cannot be allowed a payment of interest on a mortgage of real property, made by the decedent, without proof that the premises did not descend to the heir, &c.

Premiums paid for insurance effected by an administrator, on personal assets, may be allowed to the administrator.

Premiums on such insurance of real property cannot be allowed, unless the insurance was effected under the belief that the estate was insolvent.

CORNWELL v. DECK.

Expenditures for repairs to real property, and taxes levied subsequent to the decedent's death, and exclusively for the benefit of the real property, cannot be allowed.

The expense of a tomb-stone, if not excessive, must be allowed in full, although the estate be insolvent.*

Where the decedent was a merchant, and left a stock of goods in the retail store carried on by him,—*held*, that it was a fair exercise of discretion, by the administratrix, to employ a clerk to continue the sale at retail, instead of making a forced sale; and there being no proof of loss to the estate, the wages of the clerk must be allowed.

On the accounting of an administratrix she cannot be allowed for the articles which she might, as widow, have claimed to be exempt by law in her favor, on making the inventory, if they were not so allowed; especially where there is evidence tending to show that she had possession of assets not inventoried.

If the claim of exemption at the proper time, was omitted, through ignorance or mistake, the remedy is a special application to correct it, on notice to the creditors and next of kin.

THIS proceeding was for the final settlement of the accounts of Lucilla Cornwell, Administratrix of the goods, &c., of Abiah Cornwell, deceased.

The intestate was a merchant, at Woodhull, in this county, and at his decease, on the 28th March, 1872, left a stock of goods, accounts, and notes, employed in and growing out of his business, with a few other articles of personal property. His widow was appointed administratrix soon after his death, and filed an inventory on the 10th day of May, 1872, amounting nominally to over \$4,000, but which the appraisers certified would not realize more than \$3,132.08. In arriving at this latter sum, they appeared to have stated the value of the goods at cost, and the debts at their nominal amount, estimating a deduction for bad debts, and a depreciation on the goods.

The decedent had been doing a retail trade, a good deal on credit. The administratrix, the widow, employ-

*Compare *Patterson v. Patterson* (59 N. Y. 574), affirming in part, (1 Hun. 323): *Hewitt v. Bronson* (5 Daly, 1).

CORNWELL v. DECK.

ed her son as clerk, at \$20 per month, and board, for a year, to continue sales; and she then sold out the balance of the stock at auction.

The administratrix now filed her account, and asked for a final settlement. The account showed the total amount realized \$3,370, not including goods used by the family of intestate after his death, estimated at \$150, and which, added to the above sum, made the aggregate of the estate \$3,520.30.

W. W. WRIGHT, *for the administratrix.*

J. W. DININNY, *for MARIETTA and BALDWIN CORNWELL, contesting claims of DECK & WOODBURY, creditors.*

G. H. MCMASTER and E. D. MILLS, *for the contestants, other creditors.*

THE SURROGATE—The sum charged for expenses of administratrix is \$843.93. There is a mistake, made by including Wright's account at \$139; it is, in fact, only \$111.04. \$27.96 having been paid and deducted in his account as rendered, though it is charged in account of administratrix at the full amount of \$139. Included in this sum are charges for interest paid on mortgage, \$35; insurance on property, \$54.63; tomb-stones, \$100; expenses on building, \$23.33; taxes, \$9.27; services of clerk, \$240; all which are contested.

The exception to the item for interest on mortgage is well taken. The statute requires the heir to satisfy the mortgage of his ancestor without resort to the administrator. No proof is made that the mortgaged premises did not descend to the heir. (1 *Statutes at Large*, 749.) This charge is disallowed,

It was competent for the administratrix to insure the real as well as personal property at the expense of the estate, if she apprehended the estate was insolvent. (*Herkimer v. Rice*, 27 N. Y., 163). But she understood the estate to be solvent, and effected the insurance in the

CORNWELL v. DECK.

name of the heirs of intestate. So far as the buildings were concerned, it is doubtful if she were justified in charging the estate for insurance; as to the personal property, however, it is probable that in case of a loss the insurance would be held to belong to the estate, notwithstanding it was insured in the name of the heirs, upon proof of the fact that the premium was paid by the administratrix, and the situation and circumstances of the estate. (*Herkimer v. Rice, supra*; *Lee v. Adsit*, 37 N. Y., 78; *Clinton v. Hope Ins. Co.*, 51 Barb., 653.) The premium on the insurance of personal property, inventoried as belonging to the estate, to wit, the merchandise and horse, amounting to \$32.37½, must be allowed, and the balance of the charge rejected.

The charge for shingles, \$3.50, for barn on the premises; nails and door hangings, \$7.83; work on barn, \$12; taxes, \$9.09; school tax, \$0.18, levied subsequent to the death of intestate, all being exclusively for the benefit of the real estate, so far as appears, are disallowed.

It is claimed on the part of the contestants, that the estate being insolvent, no charge can be allowed for a tomb-stone. There is an intimation to that effect in *Wood v. Vandenburg* (6 Paige 277,) but there was nothing in the case calling for a decision on the point. In Connecticut it has been held that tomb-stones are properly a part of the funeral expenses. (*Fairman's Appeal*, 30 Conn., 205.) This is now more generally regarded as the rule, (3 *Redfield on Wills*, 246), and it would seem to be sanctioned in this state. (*Ferrin v. Myrick*, 41 N. Y., 315, 325.) As there is no proof that the charge if in itself proper, is excessive, it must be allowed in full.

The charge of \$240, for the services of a clerk, in selling the goods and collecting the accounts, I think

CORNWELL v. DECK.

should be allowed. The goods constituted the stock of a country store, and it was a fair exercise of discretion on the part of the administratrix to determine whether the interests of the estate and the creditors would not be best promoted by continuing the sale of the goods at retail, instead of disposing of them at auction by a forced sale. There is no proof that this course was not judicious, or that it has resulted in loss to the estate. Though the same clerk also performed the duty of collecting the debts, it does not appear that the expenses of collection were enhanced thereby. (3 *Redfield on Wills*, 416.)

[The learned Surrogate then discussed, and disallowed the administratrix's claim to be credited with money stolen, on which point his decision was affirmed upon the same view of the law, in 8 *Hun*, 122.]

It appears from the inventory that the appraisers did not set off and allow to the administratrix, as the widow of intestate, the \$150 to which she was entitled by law, and she now claims the exemption. Neither were the specific articles exempt from appraisal by the Revised Statutes enumerated in the inventory. It appears, however, by the memorandum of the insurance given in evidence, that the same covers household furniture and clothing to the amount of \$500. As this household furniture, by being insured in the name of the heirs of intestate, apparently belonged to the estate, and is not accounted for, I am unable to say that the widow is entitled to the exemption out of the proceeds of other property. Nor do I think it can be claimed for the first time on a final accounting. If, however, the omission to allow the exemption was in consequence of ignorance of her rights, or other excusable cause, she may, perhaps, now, upon a proper application, have an order to show cause, directed to

HAMMOND v. HOFFMAN.

the creditors and next of kin, why the exemption should not be allowed.

[Remarks disposing of minor questions, involving no point of general interest, are here omitted.]

Ordered accordingly.

STEUBEN COUNTY.—HON. GEORGE T. SPENCER, SURROGATE.—
SEPTEMBER, 1876.

HAMMOND v. HOFFMAN.

In the matter of the petition of AMARIAH HAMMOND, a judgment creditor of PHILIP HOFFMAN, deceased.

One who holds a judgment against the decedent and a third person recovered for a cause of action such as dies with the person, is not entitled to an order requiring the executor or administrator of the decedent to pay an equal share of the judgment.

It seems that upon the death of one bound by a joint judgment for such a tort, the creditor cannot enforce payment from the estate, until he has exhausted his remedy against all the survivors.

The fact that some of the survivors are insolvent, and that another of them may therefore be compelled to pay the whole judgment, without remedy by contribution does not give the creditor a right to pursue the estate.

THIS proceeding was a petition, by a judgment creditor, for an order requiring the administrators of Philip Hoffman, deceased, to pay a portion of a judgment recovered by petitioner's assignor against the deceased, and three others jointly in an action of defamation.

The petitioner was the assignee of the judgment which was recovered by one Peter Engel against Jacob Landre, Jacob Landre, Jr., Philip Hoffman, the decedent, and John J. Fox, for \$968.24 April 19, 1871. His application was to compel the administrators of the estate of the defendant, Philip Hoffman, to pay, with the sum

HAMMOND v. HOFFMAN.

of \$333. paid by said Hoffman in his life-time, such a further sum as should amount to one half the judgment. The precise sum claimed was \$213.05 with interest from July, 23, 1873. The ground of the application seemed to be that the other judgment debtors, Jacob Landre Jr., and Fox, were insolvent, and unless the estate of Hoffman should be made to contribute, Jacob Landre who, it appears, was responsible, would be compelled to pay the whole balance of the judgment. It was alleged, and not denied, that there were sufficient assets in the hands of the administrator of the Hoffman estate, to pay the sum now demanded, and which, it was also alleged, they had refused to pay, on the demand of the petitioner.

CHAS. J. BISSELL, *for the petitioner.*

G. H. McMASTER, *for the administrators.*

THE SURROGATE.—It is conceded that upon the death of one of several joint debtors the creditor cannot resort to his estate, till he has exhausted his remedy against the survivors or made it appear that they are insolvent; (*Hosack v. Rogers*, 25 *Wend.*, 313, 319-20; *Voorhis v. Child*, 17 *N. Y.*, 354.) But it is claimed that as the original liability on which the judgment was recovered, was several as well as joint, the judgment itself may be treated as joint and several, or that it is competent to go back of the judgment to the original liability for the purpose of this remedy.

This principle may be invoked in the case of a judgment upon contract, for the purpose of protecting the equitable rights connected with the original relations of the parties. (*Clark v. Rowling*, 3 *N. Y.*, 216.) But my attention has not been called to any case in which it has been applied to a judgment for a tort, especially when the cause of action was one which died with the person.

HAMMOND v. HOFFMAN.

In such a case, there is no debt till the judgment is rendered, and in such judgment the cause of action is completely merged.

But if it were otherwise, I am unable to see that the judgment creditor in this case occupies a position which entitles him to the aid of the principle referred to. It is a matter of no interest to him, that one judgment debtor rather than another, should be compelled to pay the judgment. His remedy for its collection is simply against the survivors.

The fact that no contribution can be enforced between the judgment debtors, does not concern him. The death of one of them is no obstacle to enforcing payment or satisfaction against the survivors by execution. (*Day v. Rice* 19 *Wend.*, 644; 2 *Tidd Practice*, 162). This judgment creditor is under no present necessity at least to resort to this court for and against the estate of the deceased joint judgment debtor.

This application is evidently made in the interest, if not at the instance, of the surviving judgment debtors, and as an indirect means of compelling a contribution by Hoffman estate, to the payment of the judgment. For this purpose the petitioner has no standing. He can maintain no action on the judgment except against the survivors. He cannot have an action, in the nature of, or as a substitute, for a *sciri facias* against the heirs of Hoffman, to hear execution of the judgment, without showing that there is no property of the other judgment debtors out of which satisfaction can be had. (*Woodcock v. Bennett*, 1 *Cow.* 739; 2 *Tidd Practice*, 1033.

It is the duty of the Surrogate to protect the equitable rights of parties within the scope of his jurisdiction where they are involved in the proceeding before him. (*Goodyear v. Watson*, 14 *Barb.*, 481.) But in this case there does not appear to be any thing calling for the

interposition of his powers in this respect. The application must be denied.

Ordered accordingly.

STEBEN COUNTY—HON. GEORGE T. SPENCER.—SURROGATE.—
MARCH, 1876.

JENNINGS v. JONES.

In the matter of the application of JANE E. JENNINGS, et al., administrators of the estate of HELEN C. JONES, deceased, for leave to mortgage, lease, or sell her real estate for payment of debts.

The decedent in her life-time conveyed land in fraud of creditors, to one who was now her heir. A creditor recovered judgment for his demand against the administrators, after a trial on the merits. He also recovered a judgment against the heir, setting aside the fraudulent conveyance, so far as necessary to allow him to proceed for a sale of the lands. The administrators then applied for leave to sell the decedent's land, for payment of debts.

Held, 1. That as the application included other lands besides those affected by the fraudulent conveyance, the heir might raise the same objections that he might have raised, had there been no fraudulent conveyance and decree vacating it.

2. Irrespective of there being other lands included, the heir was not precluded from questioning the validity and amount of the debt on which the creditor had proceeded.*

The principle that a judgment against one sued as an individual, is not an estoppel against him in a subsequent action in which he appears in a representative character, applied where in the second action he claimed as heir.†

* For the rule as to conclusiveness of judgment against administrator, in an action to set aside decedent's fraudulent conveyance, see *Kent v. Kent*, (92 N. Y. 560; rev'g 3 Sup'm. Ct. (T. & C.) 630; mem. S. C., 1 Hun., 529.) As to rights of heirs of grantee, under a fraudulent conveyance, see *Cole v. Malcolm*, (7 Hun., 31.)

† *S. P. Larroux v. Larroux*, *Ante* p. 69. A judgment in creditor's suit is not a bar to action on grantee's promise to pay debt of debtor. (*Fischer v. Hope Mut. Life Ins. Co. of N. Y.*, 40 Super. Ct. (J. & S.) 291.

JENNINGS v. JONES.

A suspension of the running of the statute of limitations is not confined to the causes specified in the statute, but may occur in other cases of the disability of the creditor to prosecute.†

An heir who, by taking a fraudulent conveyance from his ancestor, in the ancestor's life time, has prevented creditors from proceeding to cause the land to be sold as the decedent's, until after the statute has run against their demands, cannot avail himself of the bar of the statute, to defeat such proceedings taken after they have procured the conveyance to be adjudged void.

THIS was an application by Jane E. Jennings and others, administrators of the estate of Helen C. Jones, deceased, for leave to mortgage, lease, or sell her real estate for payment of debts.

For the purpose of establishing a debt of the intestate to William B. Jennings, the administrators introduced the following evidence:—

1. A judgment in the Supreme Court recovered by him against the administrators, after a time upon the merits.

2. A judgment in his favor against Henry S. Jones, the contestant, adjudging said Jennings, a creditor of deceased in his life-time, and that a conveyance made by her to said Henry S. Jones, was fraudulent and void as to her creditors, and as to said Jennings, and setting the same aside so far as it is an obstruction to the collection of such debt, by proceeding to procure the sale of the real estate conveyed for the payment of her debts, and allowing said Jennings to take such measures for the collection of his debt as if such conveyance had not been made and,

† Contingent liabilities may be presented to the executor under the statute; but it seems cannot be rejected so as to bar action. &c. (*Boyt v. Bennett*, 50 N. Y., 538; reig 58, *Barb.* 529.)

As to deduction for time when trusteeship was vacant, see *Dunning v. Ocean Nat. Bank.* (61 N. Y. 497; aff'g 6 *Lans.* 296.)

As to effect of removal of administrator, on limit of time to apply for leave to sell &c., see *Slocum v. English*, (2 *Hun.*, 78.)

JENNINGS T. JONES.

3. The conveyance by intestate to said Henry S. Jones, of the property sought to be sold in this proceeding, and so adjudged fraudulent and set aside.

A. S. MCKAY and A. S. KENDALL, *for the administrators,*

insisted that this evidence, for the purpose of this proceeding conclusively established the existence, validity, and amount of the debt of William B. Jennings, against the intestate, at least as against Henry S. Jones, the party here contesting.

A. HADDEN, *for MR. JONES, the contestant,*

conceding that the judgment recovered against the administrators was *prima facie* evidence of the debt, insisted that he was not precluded in this proceeding, either by that judgment, or the adjudication against him, from contesting both the validity and amount of the debt.

THE SURROGATE.—This application embraces lands owned by intestate at her death, other than those affected by the judgment against contestant. In respect to such other lands, though of small value, the contestant has the same rights as if the judgment against him had not been rendered. He is therefore, permitted to raise any objections to the proceeding, which the heir is allowed to make in any case.

I think furthermore, that the only effect of the judgment against him, is to remove the obstruction to this proceeding caused by the fraudulent conveyance to him by the intestate in his life-time, so as to leave to the creditor the same remedy as if the conveyance had not been made. I can perceive no reason why the remedy thus afforded should not be subject to all the incidents which would otherwise attend it, and the defences which the statute allows to the heir. The judgment

JENNINGS v. JONES.

seems to be cautiously framed to have that effect. It is conclusive only on him and the plaintiff therein. This application is made by the administrators, who are no parties to that judgment; though it furnishes them the authority to proceed against the land effected by it. By the adoption of the view here taken, full effect will be given to the provisions of the statute allowing the heir to contest the debts of his ancestor in this proceeding, and no injustice will be done to the creditor.

I am of the opinion also that the judgment against the contestant fails to be conclusive on him for another reason. It was recorded against him, in his individual capacity, in a different character from that in which he appeared here. This proceeding is against him in the representative character of heir. "A judgment against a party, sued as an individual, is not an estoppel in a subsequent action in which he sues or is sued in another capacity, or character. In the latter case, he is in contemplation of law a distinct person and a stranger to the prior proceedings and judgment." (*Rathbone v. Hooney*, 58 N. Y. 463, 467. See also *Lee v. Dill*, 39 Barb. 516; *Havens v. Sherman*, 42 Barb., 636.)

The point made on the part of the administrators is a novel one, at least in its application, and is not without argument to support it; but to sustain it, seems to me will present difficulties which cannot be reconciled with the rules of law. The contestant must be permitted to give evidence to reduce or invalidate the debt for which judgment was recovered against the administrators.

In the further progress of the hearing, the contestant insisted that the debt in question had become barred by the statute of limitations, although not till after the

JENNINGS v. JONES.

commencement of the action in which the judgment was recovered against the administrators.

THE SURROGATE.—This position cannot be sustained. The creditor, before the debt had become barred, instituted his only remedy for its recovery, by first bringing his action against the administrators, and then his further action against the contestant, to remove the obstacle which prevented him from instituting this proceeding, both of which it seems he has prosecuted with diligence and success. A suspension of the running of the statute of limitations is not confined to the cases specified in the statute, but many occur in other cases, of the disability of the creditor to prosecute. (*Hemger v. Abbott*, 6 *Wallace*, 532.) The disability of the creditor to institute and prosecute this proceeding, under the circumstances of the case was as complete as if it had been created by the statute, and no laches or fraud can be imputed to him. He could not allege that the intestate died seized of the real estate which is the chief subject of this controversy. There was nothing to give this tribunal jurisdiction over it, till the conveyance by the intestate to the contestant was set aside. The contestant cannot be allowed to take advantage of a delay which he has himself occasioned, and by that means take the advantage of his own wrong. (*Broom's Legal Maxims*, 212; *Haad v. Seely*, 47 *Barb.*, 428, 434; *Newton v. Porter*, 5 *Lans.* 416, 423.)

The debt of William B. Jennings was allowed at the amount for which his judgment was recovered against the administrators, with interest, exclusive of costs; and a sale was ordered.

CRANDALL v. SHAW.

CORTLAND COUNTY.—HON. A. P. SMITH, SURROGATE.—JANUARY, 1874.

CRANDALL v. SHAW.

In the matter of the Last Will and Testament of DANIEL J. SHAW, deceased.

After citations have been issued on a petition for the probate of a will, the Surrogate may appoint a collector or special administrator upon petition of one intending to contest the will, showing that the contest will be such as to cause delay.

Under section 23 of the act of 1837, (3 R. S. 6 ed. 79 § 41,) the Surrogate has power to make such appointment in anticipation of a delay which is necessarily to ensue.

Under section 11, of L. 1864, c. 71, which is still in force, notwithstanding L. 1867, c. 782, § 7, after the executor or other persons interested in a will have appeared before the Surrogate—*e. g.*—by making application to him for probate,—ten days' notice must be given them of any application to appoint a collector or special administrator.

An appointment made without such notice must be vacated on application; but the collector having acted in good faith may be allowed his compensation and expenses.

An executor or other person who is a party to the litigation should not be appointed collector.

THIS was an application by executors to vacate the appointment of a collector, or special administrator, procured by an intending contestant of the will, and to procure appointment of one of the executors as collector in his stead.

On the 23d day of December, 1873, H. Crandall, as executor named in the last will and testament of D. J. Shaw, deceased, presented a petition to the present Surrogate, for the proof of the will of Daniel J. Shaw, and the Surrogate issued citations to the heirs and next of kin returnable before him at his office on the 16th day of February, 1874, at 10 o'clock A. M. On the 24th day of December, 1873, Robert T. Shaw, an heir and next of kin of deceased, presented his petition to the Surrogate,

CRANDALL v. SHAW.

asking the appointment of Samuel Keator, as collector or special administrator of the estate. The petition set forth the death of Daniel J. Shaw on the 20th day of December, 1873. That he left an estate of between \$300,000 & \$400,000, consisting of bonds and mortgages, promissory notes, gold, silver and paper money, together with real estate of the value of about \$10,000. That he left what purported to be a last will and testament and codicil made during his last sickness, when he was weak and enfeebled in mind, giving the property to those not his legal heirs. The petition further set forth that a petition had been made for the proof of said will and codicil, and citations had been issued, returnable on the 16th day of February, 1874, before the Surrogate. That the property aforesaid had, while said Shaw was in an unconscious and demented state, been taken from his premises by strangers in blood to said Shaw. That the petitioner and other heirs at law and next of kin intended to contest the will and testament and codicil, whenever the same should be presented for proof, and that a lengthy contest would ensue on the proof thereof, and great delay would necessarily be produced in granting letters testamentary, or of administration on the estate, and that the best interests of the estate required the immediate appointment of some suitable person to take the care and management of the estate, and to preserve the same during such delay,—and asked for the appointment of Samuel Keator of Cortland, as such collector or special administrator. Upon this petition the Surrogate, finding said Keator to be a suitable person, appointed him as such collector, and he immediately filed his bond and oath of office, and entered upon the discharge of his duties as such. This was done without any notice to the executors, or to any other person. The executors named in the will and

CRANDALL v. SHAW.

codicil now presented their joint petition for the removal of Mr. Keator, and the appointment of Hiram Crandall, one of the said executors, as such collector.

H. CRANDALL, W. H. SHANKLAND, and M. M. WATERS, *for the motion.*

M. GOODRICH, J. S. BARBER, B. A. BENEDICT, O. U. KELLOGG, and others, *opposed.*

THE SURROGATE.—The first point made by the proponents of the will and codicil and the petitioners in this case is, that there was at the time of the appointment of Mr. Keator, no contest existing, and that until such contest, no collector can be appointed to take charge of the estate.

The 23d section of the statute of 1837, (3 R. S. 160., §. 38,) provides, “in case of a contest relative to the proof of a will, or relative to granting letters testamentary, or of administration, in case of intestacy, or when, by reason of absence from this state, of any executor named in a will, or for any other cause, a delay is necessarily produced in granting such letters, the Surrogate authorized to grant the same may in his discretion issue special letters of administration, authorizing the preservation and collection of the goods of the deceased.”

I think this objection of the proponents not well taken. Had the legislature stopped with providing for the appointment of a collector in cases of contest over wills, or over the granting of letters of administration in cases of intestacy, there would have been plausibility in the argument now made by the counsel for the proponents; but when the law adds, “or for any other cause, a delay is necessarily produced in granting such letters, the Surrogate authorized to grant the same may in his discretion issue special letters, &c.,” it gives authority for the appointment in all cases, where for any

CRANDALL & SEAW.

reason a delay is necessarily to be produced. (*Mootrie v. Hunt*, 4 *Bradf.*, 173.)

In this case the Surrogate had issued his citations on the 23d of December, returnable February 16th, nearly two months thereafter. The petition on which the collector was appointed stated that on the return of the citations, the heirs and next of kin, including the petitioner, intended to oppose the probate of the will and codicil, and that a lengthy contest would ensue—which has been verified by a litigation of over three months, and the end is apparently still in the distance.

Here was between \$300,000 and \$400,000 with no one to protect or preserve it during the contest, or even during the two months before the contest should begin. I think there can be no question that the Surrogate had power to appoint a collector or special administrator in this case, and that it was a very proper case for such appointment.

The next objection taken by the proponents is that no notice was given to the executor's name, in the will and codicil, of the application for the appointment of Mr. Keator. This I consider as the important question involved in the motion to vacate Keator's appointment.

The act of 1864, (chapter 71, sec. 11,) provides as follows: "no person shall be appointed collector or special administrator in accordance with the said 23d section, as amended by this act, except on a notice in writing, of at least ten days, to every person who has appeared in the proceedings before the Surrogate, to be served in the manner provided by the code of procedure for the service of notices in actions; nor until such person has filed the security required by law, which shall not be filed until the sureties thereto have justified before the said Surrogate, which justification shall be on the like notice of ten days, to be served as herein above provided."

CRANDALL v. SHAW.

The amendment of the 23d section of the laws of 1837, referred to above, is contained in sec. 10 of ch. 71, of the laws of 1864, and consists in adding the following to the original section 23, to wit:—"but any person or persons named as executors or executor in such will shall be first entitled to such special letters upon filing the bond required by law; and upon such filing, the power and authority of any collector theretofore appointed, shall cease; but no special letters shall in any event issue to any person incompetent to serve as an executor under the provisions of section three, article one, title two, chapter six, part second, of the revised statutes."

It will be seen that this amendment lets the original section stand as formerly, and only adds the above provision to it.

By sec. 7, ch. 782, of the laws of 1867, (vol. 2, p. 1928,) sec. 10, of ch. 71, of the laws of 1864, above cited is repealed, only retaining the provision: "but no letters of collection shall be issued to any person incompetent to act as such executor." This repeal leaves sec. 23, of the laws of 1837, first above quoted, in full force, with the addition last above quoted, from the laws of 1867, added thereto.

The question is, does section 11 of the laws of 1864, apply to the original section 23, with the amendment thereto repealed, with the same force and effect as it did before the amendment was repealed, or did the repeal of the amendment to that section at the same time in effect repeal section 11. I have carefully examined these amendments, and have come to the conclusion that section 11 of ch. 71, laws of 1864, is still in force and applies to section 23, of laws of 1837, and that where the executors or other persons interested in the will have appeared before the Surrogate, it is necessary that they have the notice of 10 days of an application for the appointment

CRANDALL v. SHAW.

of a collector or special administrator. Sec. 11, of ch. 71, laws of 1864, is prohibitory, and forbids the appointment of a collector in such case, without the service of the notice on all parties who have appeared. In this case the petition on which Mr. Keator was appointed, shows that the executors had made application to me for the proof of the will. They had therefore appeared in the proceedings, and if my conclusion is correct, that that section is still operative, they were entitled to notice of the application for the appointment of Mr. Keator, and not having had it, his appointment is irregular. There must therefore be an order entered vacating the appointment of Mr. Keator, as such collector. But he having acted in good faith as such, must receive compensation for his services and expenses in the care and custody of the property during his collectorship, to be adjusted by me hereafter.

The executors claim that Mr. Crandall should be appointed as collector during the pendency of the proceedings, which is resisted by the next kin. It is claimed by the next of kin, in opposition to his appointment, that he received nearly all the property of the deceased, before his death, and while he was incompetent to do any business, and that there was a large amount of government bonds owned by the deceased which are unaccounted for, and that an impartial person should be appointed who will investigate and obtain such bonds and other property, and preserve the same during this litigation. I have very carefully considered this question, and have consulted the authorities upon this subject, and have come to the conclusion that the proper rule is laid down in the case of *Mootrie v. Hunt* (4 *Bradf.* 173). That was a contest over a will. The Surrogate of New York had decided in favor of the will, and had admitted it to probate. The amount of the estate was claimed by the next of

CRANDALL v. SHAW.

kin to be \$20,000. The executor and chief legatee claimed it did not exceed \$1,500. The contestants appealed from the decision of the Surrogate admitting the will to probate, and then applied to the Surrogate for the appointment of a disinterested person as special administrator during the litigation. This was resisted by the executor and principal legatee under the will, when the Surrogate decided that an impartial person should be appointed. The Surrogate in his opinion says:—"The object contemplated by the statute in the appointment of a special administrator is the collection and preservation of the goods of the deceased, whenever a delay is necessarily produced by reason of a contest, or any other cause, in the grant of letters testamentary or of administration. The matter is entirely within the discretion of the Surrogate, which is ordinarily exercised in authorizing the collectorship whenever a long delay appears probable in respect to the grant of administration in chief. The contest in this case relates to the probate of the will, and therefore involves the title of the very property which it is sought to place in the hands of the collector. The case is pending on appeal in the supreme court, and if carried to the court of appeals cannot be finally determined very briefly. During this litigation there is no reason why the property of the deceased should be left without official care and supervision. The petitioner states its amount and value at twenty thousand dollars, and the executor named in the will does not estimate it beyond fifteen hundred dollars. In either case, it is of sufficient consequence to be placed in the hands of a collector until the controversy be determined. *It is not proper nor customary to appoint either of the parties litigating collector. An indifferent person should be selected.*"

This case is directly in point; it is a case of less

 CRANDALL v. SHAW.

strength for the contestants than the one before me; has never that I can find been overruled or questioned by any decision of any other court; commends itself to my judgment; and should be followed. It results that the application for the appointment of Judge Crandall, as collector, should be refused, on the sole ground that he is a party to this litigation, and that a disinterested person should be appointed as collector during this litigation. I prefer to put this conclusion upon the above grounds rather than upon suggestions urged by counsel upon the argument of this motion, which I prefer not to consider.

The motion to vacate the appointment of Mr. Keator, is granted. The motion to appoint Judge Crandall is denied. As there is no other motion before me for the appointment of any particular person as collector, that is left for future consideration whenever the proper motion shall be made.

Order entered accordingly.

 CORTLAND COUNTY.—HON. A. P. SMITH,—SURROGATE.—AUGUST, 1874.

SHAW'S WILL.

*In the matter of proving the last Will and Testament of
DANIEL J. SHAW, deceased.*

Insane delusions on the part of the testator, as to any one of his relatives, are sufficient to avoid his will.

Apart from dementia, or loss of mind, the test of insanity as disqualifying a testator, is mental delusion, affecting the testamentary disposition.

If a person persistently believes supposed facts which have no existence, except in his perverted imagination, and are against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under an insane delusion.

If such delusions relate to persons who at the time would naturally have been the objects of his testamentary bounty, and the court can see

SHAW'S WILL.

that the disposing provisions of the will were or may have been caused or affected by the delusions, the instrument is not his will, and cannot be sustained.*

The fact that a testator entertaining delusions as to his relatives, gave them but \$11,000, and gave the residue, of about \$300,000, to his executors, in trust for such charitable purposes as they might determine, with an express clause of disinheritance, is cogent evidence of testamentary incapacity.

Evidence of delusions as to relatives is not countervailed by evidence of business capacity as to ordinary transactions.

If a testator, though having adequate business capacity, has the delusion that relatives for whom he would naturally provide are combining against him, or are impostors, or not related to him, or are his enemies, or are trying to take advantage of him, or get his property or injure him, and he refuses to be reasoned out of the delusion, and continues to believe in it against evidence and probabilities arising from their relationship, acquaintance and conduct, and the delusions are without foundation, in fact,—he is insane and his will cannot be sustained.

Evidence of the circumstances upon which an old man who had been the subject of delusions, was held also to have become incapacitated from all testamentary acts, whatever, by dementia.

THIS was an application to prove the will of Daniel J. Shaw. The facts are detailed in the opinion of the Surrogate.

WM. H. SHANKLAND, M. M. WATERS, and HIRAM CRANDALL, *for the proponents.*

MILO GOODRICH, O. U. KELLOGG, J. S. BARBER, E. A. WORDEN, and WM. E. HUGHETT, *for the contestant.*

THE SURROGATE.—Daniel J. Shaw, whose will and codicil have been presented to me for probate, died at Homer, Cortland county, on or about the 20th day of December, 1873, at the age of about eighty-eight to ninety years. The inventory of his personal property shows it to be worth something over \$292,000, and his real estate is worth some \$15,000, making in all, some-

* Compare *Colhoun v. Jones* ante p. 34; and for a case of alleged delusion not affecting the testamentary act, see *Bonard's Will* (16 Abb. Pr. N. S. 128 and cases cited.)

SHAW'S WILL.

thing over \$307,000. The will, dated February 8th, 1872, and the codicil, dated December 11th, 1873, together, give about \$29,000 to his relatives, beside certain real estate, \$1,000 each to two institutions in Auburn, \$1,000 to Dr. Head, and the balance of \$275,000 to his executors, Hiram Crandall, James Douglass, and Aaron Sager. By a clause in the will, which is void, it is to be given to the two first named, to be given to such charitable and benevolent institutions as they shall deem proper. In the codicil, Sager is added as executor, and it is given to the three absolutely.

Mr. Shaw was a bachelor, and consequently left no legal descendents ; but he left an only sister, aged about seventy-four years, living at Springport, Cayuga county, N. Y., and numerous descendents of deceased brothers and sisters, some residing in his vicinity, and others in different portions of the country, and several of whom had been, for considerable period of time, members of his family.

In former life, the deceased was a very intelligent and refined gentleman ; not only thoroughly informed on the general topics of the day, but well versed and much interested in literature and literary institutions ; very polite and circumspect in his deportment, and, in a word, conceded to be a thorough gentleman of the old school. He was a member of the constitutional convention of 1846, and was, at that time, and for a considerable time after, a leading citizen of the community where he resided. He was a careful, discreet business man ; his business being confined chiefly, so far as the evidence shows, to the simple branch of money lending, in which business he became an adept. No man was keener to detect a flaw in the title, a lien which affected it, or any other defect which could endanger a security. By many years of practice in this branch of business, the detec-

SHAW'S WILL.

tion of such defects became so much a habit, that he became so technical that in later years it made him needlessly exact.

The evidence does not clearly disclose his character as to petulance and excitability in youth and vigorous manhood, except that it shows him to have been a polite and polished gentleman. But, for the last few years, he seems to have been very petulant, forgetful and peevish, and his habits of sleeping and eating very irregular. He became suspicious, and accumulated fire-arms of various kinds, so that eleven were found in his house after his death, the first one being so loaded as to burst, on being discharged. There were ten pistols—one so fixed as to be fastened upon the door, to be discharged by the entrance of any person from the outside. He had other weapons. In other words, he had become transformed from the gentleman of other years to the peevish, suspicious old child, which is often seen at ninety. For over forty years he was afflicted with a polypus, which much disfigured his face. It was removed about 1842, but returned soon after, and became malignant. From it were emitted much matter and disagreeable odors. He was very hard of hearing, was drowsy, and frequently fell asleep while talking with others, and for some time before his death, there was a marked failure in his physical and mental faculties. He nevertheless continued to do his business of money lending, collecting and keeping accounts, up to a few months of his death, conversing with considerable intelligence at times, not only on the subject of money lending, but of investments for colleges, etc., and writing sensible business letters and letters of miscellaneous correspondence. From 1870, he was attended much of the time by his relatives, Robert Tenant Shaw, and William H. Shaw, and others, who aided him in his business transactions. He

SHAW'S WILL.

kept a diary of his transactions with a good degree of accuracy, for a man of his age.

Having no descendants, he at an early day conceived the idea of disposing of his property by will. As early as July, 1832, when he was about forty-seven years of age, he wrote his own will, by the terms of which all property was given to his relatives, and he provided for a family burying ground, in which all his relatives were expressly privileged to be buried. By this will he appointed two of his relatives as executors, with the direction to his sisters to nominate the third.

In January, 1837, when about fifty-two years of age, he wrote another will, though never fully executed, by which he appointed two executors, as before, leaving the third one to be named by his sisters who should survive him, and bequeathing all his property to his relatives.

In May, 1854, when about sixty-nine years old, he wrote and signed another will, giving his surviving brothers and sisters, or any two of them, the privilege of appointing his executors, and dividing his entire property into twenty shares, and giving the whole to his relatives. By this will he gave Robert Tenant Shaw one-twentieth part of his entire property. I mention the case of Robert Tenant Shaw, at this point, because he is still alive, and I shall hereafter have occasion to notice the change in his case in particular. In this will he bequeathed to William H. Harrison, an adopted child named by him, the sum of five thousand dollars.

On the third day of October, 1870, when he was in his eighty-sixth year, he executed another will, written by himself, by which he appointed Robert Tenant Shaw, with some other man, whose name is obliterated, as his executor. By this will he bequeathed to Robert Tenant

SHAW'S WILL.

Shaw the sum of twenty thousand dollars, besides one thousand dollars and other compensation as fees for executing the will. Aside from a bequest of one thousand dollars each to the Home of the Friendless and the Orphan Asylum, both at Auburn, all the bequests in this will are to his relatives.

On the back of this will, but without date, is added in his own handwriting, the following, among other memoranda: "As I expect Robert Tenant Shaw to be at expense and trouble in carrying into effect this will, and keeping vaults, etc., in repair, and such other things as may be useful for the honor of the family, I have willed to him the largest sum of any of my heirs." In this will he gives Mrs Lowrey, his sister, ten thousand dollars. In this memorandum he also expressed an intention to name a benevolent purpose to which the residuum of his estate should be given. In this will he also bequeathed the farm of 150 acres, in Summer Hill, to Robert Tenant Shaw, in trust for the care of his vault, etc. Then in the memorandum, in the handwriting of deceased, but in different ink, and evidently written at another time, though at what time can not be ascertained from the paper, is the following memorandum: "Having satisfactorily discovered that Robert Tenant Shaw has, by lying and other shameless deceits and wrongs, deceived and injured me, I hereby withdraw all trust and confidence in him, and desire that he be excluded from inheriting any part of my property or estate, or having anything to do with the disposition of any part thereof, and desire that his name be erased from every part of the foregoing part of this will, where it is written, or given any part or thing to do with it." This memorandum is written below the foregoing one, expressing confidence in Robert T., and is followed by an attestation clause, beneath

SHAW'S WILL.

which are the signatures of the deceased and the subscribing witnesses. It is worthy of remark that in all these old wills, there were originally blank spaces left in the body of the will, which from time to time were filled up by the testator, after execution, as his mind met with a change. They are also erased and interlined in many places. In all these wills he showed the most tender regard and love for his family relatives, and particularly toward Robert Tenant Shaw, who the evidence shows had been much in his family, and had materially aided the testator for a long time in the transaction of his business. Letters in the handwriting of Daniel J. Shaw, to Robert Tenant Shaw, have been produced, written at different times, from 1848 to 1869, in which the testator speaks in the highest and most endearing terms of him as his beloved nephew. The will of 1870 shows that this feeling was entertained at least until the latter part of that year. The only evidence that the testator's suspicions had been aroused against Robert Tenant, before the will of 1870, was a letter produced in the handwriting of the testator, directed to Robert Tenant, but never sent, and found among the papers of the deceased, after his death. This letter bears date on the 19th day of March, 1870, over six months before the making of his will, appointing Robert Tenant his executor, and giving him twenty thousand dollars besides his fees, and expressing the utmost confidence in him. This letter makes about the same charges against Robert Tenant with about the same as the foregoing memorandum. It was introduced with the memorandum to show that the testator had something on which to let his judgment act in arriving at the conclusion that Robert Tenant should be disinherited. But in my judgment, if its date is correct, it only shows the vacillation and unfounded suspicions of an

SHAW'S WILL.

old man who, after almost an ordinary life-time of close friendship and uninterrupted and implicit confidence in his nearest living relative except one, in March, distrusts him, and without cause, so far as the evidence shows, charges, or intimates that he is his enemy, and in the following October, forgets his suspicions of the March before, makes him the chief legatee in his will, giving as a reason that he expects him to do such things as may be useful for the honor of the family; then, soon after, adds a memorandum charging him with the same thing as before, and finally makes his will, February 8th, 1872, and his codicil December 11th, 1873, entirely disinheriting him. On the 8th day of October, 1872, the testator wrote his attorney: "R. Tenant Shaw, whom I suspect and rather believe is an imposter and not related to me, has behaved in such a manner as to utterly deprive me of any confidence in him, as truthful or honest," etc. This was over a year before the making of the codicil, and just eight months after making the will now contested.

He told Mr. Waters at the time he drew the will, that he had the idea that he (Robert) was a man fit to be trusted, but that he had lied about him, and that he found him to be a very bad man, and that he desired that his name should not appear in his will. He said he had found he could not be trusted, and he had disinherited him entirely.

Mr. Waters says: "He stated considerable. I think that he said that he was satisfied that R. T. Shaw had been opening his letters and substituting letters that were other letters in the place of those that had been written to him." It will be observed that this was February 8th, 1872, long before the vulgar letter now claimed to have been substituted, and to have furnished a reason for his suspicion. That is dated September 26th, 1872.

SHAW'S WILL.

There is nothing in the evidence showing that there was any foundation for these charges, and of course if in his right mind, the testator well knew that Robert Tenant Shaw was not an imposter, but was the nearest relative he had on earth, save his only sister. The evidence shows that Robert Tenant had been uniformly kind and attentive to the testator, and I think the counsel for the proponents is mistaken, when he says there was something calling for the exercise of judgment on the subject of these charges. It is but the assertion of the belief of a fact, such as is always made by the insane, but furnishes no evidence whatever of the truth of the charges. It seems to me the evidence shows them to be entirely without foundation in fact. Certainly if there is any evidence justifying these suspicions, I have overlooked it in my examination of this case. It is proper to notice also in this connection, that at the time the codicil was executed the wicked scheme of sending the indecent letter of September 26, 1872, if it ever was sent, had been concocted and carried into effect by somebody, with the view of prejudicing the mind of the testator against Robert Tenant Shaw, and of inducing his discharge from the testator's service, which object it accomplished. Robert swears he never wrote nor heard of this letter until during this trial, and produces several respectable witnesses who are acquainted with his handwriting and who say it is not his. I can see no earthly reason why Robert Tenant Shaw should write such a letter, and it seems to me any man of sound mind would on the face of it have been satisfied that he never wrote it. Yet the proponents now claim that that letter justified the testator in writing Mr. Waters, soon after, that Robert was an imposter and not related to him. On the subject of undue influence, this letter and the wicked scheme which prompted it become impor-

SHAW'S WILL.

tant. While considering the delusions as to Robert T., the evidence of William H. Harrison becomes material. He went to Cortland from Summer Hill, with the testator, in February, 1872, at the time the will in question was executed. He testifies that at that time the testator made charges against his sister, Mrs. Lowrey, and Robert Tenant Shaw, that they were combining against him and wanted to get his property. The evidence also shows that at a latter day he charged Robert T. and Miss Lacey, his house keeper, with a combination and conspiracy against him. This was in 1872. He told Mrs. Thompson, a witness for the proponents, that the last soup that Miss Lacey prepared, he thought Robert had put a little "kindness" in it, as he knew of arsenic being bought. He said he thought Robert had changed toward him from the time he learned he might live to one hundred and fourteen years old.

I may have omitted other evidence with reference to these charges against Robert Tenant Shaw; but I have quoted sufficient from the great mass of evidence, to show the character of these charges, which, from time to time, he made against Robert. There is no proof that justifies them, and they were doubtless entirely unfounded, and were but the delusions of an enfeebled old man who, in 1870, loved this nephew above all his other relatives, and yet through some influence not satisfactorily defined in the evidence, or through the weakness of a dis-tempered brain he was suddenly transformed in the testator's imagination into a conspirator, and a person in no way related to the deceased. The law to be hereafter applied to this case properly describes and characterizes these delusions.

Having noted these charges and changes as to Robert, I might stop here in this investigation. For if the testator has insane delusions as to any one relative, it is

SHAW'S WILL.

sufficient to set aside a testamentary disposition of his property. But this is an important case, both as to the amount involved and the time spent on the trial of it, and its importance leads me to consider the feelings of the testator towards his other relatives, as bearing upon this question of sanity.

As has been stated, the deceased left but a single sister, Mrs. Lowrey, of Springport, N. Y. She has been before me, and appears like a good, quiet, sensible old lady. In his former wills, Mr. Shaw had always remembered this sister, and in the will of 1870, had given her ten thousand dollars. The evidence shows that before making his will in February, 1872, the testator thought he had a vision in which his spirit was taken by an angel to the gate of heaven and shown the beauties thereof. He desired to enter, but was told that he must return to his old body and remain until he was one hundred and ten years old. Some say 114, and some 109. He seems at one time to have told his vision to this only sister, when he said she laughed at it, and as he believed, she told it to others. Mr. Waters testifies that when the will was drawn, he said she made derision of it. Prior to that time, the relations of this brother and sister appeared to have been uniformly friendly, and no reason so far as she is concerned, is shown for any suspicions or unfriendly feeling on his part toward her. But because she did not believe in his vision, he seems to have become offended at her, and in the will under consideration, he entirely disinherits her, giving that as a reason to Mr. Waters when drawing the will. Mr. Waters, himself, testifies that he thought this was a little strange, and told him so. In speaking of Mrs. Lowrey, Mr. Waters says of her, "A very fine person, I should say." The evidence shows that in addition to her offense of disbelieving the vision, the testator be-

SHAW'S WILL.

lieved she was combining with Robert Tenant Shaw, to get the testator's property. Judging from the testimony in this case, and her appearance in court, nothing could be further from the truth. It was the mere delusion of a feeble old man, whose mind, once strong and vigorous, had become impaired by age and the diseases which afflicted him. This may not be all the evidence on the subject of his delusions, with reference to Mrs. Lowrey, but it is sufficient in my judgment, taken with the other facts in this case, to show that not only at the time of the making of the codicil, but when the will was executed in February, 1872, the mind of Daniel J. Shaw was filled with delusions as to the character, designs and conduct of this only sister and nearest relative. They were entirely unfounded, and yet seeming real to him, induced him, as was natural, if believed, to disinherit her, when his purpose through life, to ripe old manhood, had been to give her ten thousand dollars.

I now proceed to notice briefly his delusions and change of conduct towards his other relatives. It will be observed that in all his former wills, he had given his property to his relatives, showing a strong attachment for them. Mr. Waters says, when he drew the will, the testator said concerning them, "that he desired none of them should have any portion except what he gave them in that will, and desired it to be expressly stated to that effect. He stated generally that they had conducted themselves in such a manner as would lead him to think that they did not deserve it."

From April, 1870, to October, 1871, all of which was before this will or codicil was executed, Eugene Scott, an heir at law, and a son of a deceased relative, dearly beloved by the testator, kept house for him in Summer Hill. The evidence shows that the testator frequently charged Mr. Scott with poisoning him, for the purpose

SHAW'S WILL.

of getting his property away from him. This was when the testator was eighty-five or eighty-six years old. Mr. Allen, a supervisor of the town, to whom he told these suspicions, endeavored to reason him out of it; told him it was absurd; that Eugene Scott could have no motive to poison him; but he still insisted that it was so, and evidently believed it. To Mr. Howell, the justice of the peace, who had formerly lived in his family, he stated that the Scotts had poisoned him with slow poison. He said they seemed to be in a hurry to get his property. He thought he received his poison in his victuals. As to his relatives, without specifying which, Mr. Howell says, "I have heard him state that his relatives seemed to be in a hurry to get his property. I think at three different times." He thought that they wanted him out of the way, so that they could get his property.

Eugene Scott testifies that the testator charged his (Scott's) wife, with poisoning his succotash, in 1871. He (Scott) ate some of the succotash and there was no poison in it. Mrs. Scott is dead.

Albert Hopkins and wife kept the testator's house from December, 1871, to March, 1872, and were there at the time this will was made. While they were there, Mr. Shaw said he thought something had been put into his food; that it tasted queer, and he requested the Harrison boy to taste of it and see. No poison had been put in. Mrs. Hopkins states another fact which is corroborated by the boy William H. Harrison, that when Mr. Shaw returned from Cortland, at the time of making the will, he was under the influence of spirituous liquor; vomited and it emitted the odor of liquor.

In March, 1872, the testator moved to Homer, and was from that time until May, 1872, in the family of Mr. Stimson, whom he does not seem to have charged with poisoning him. He got considerably excited there and

SHAW'S WILL

slammed the door and talked to himself in a dissatisfied tone, as Mrs. Stimson says. He was forgetful, and lost things, and once when he lost a search, rather intimated that everything was not quite right, though Mrs. Stimson says she can not say that he charged her to her face with having stolen it.

From the last of April, or fore part of May, 1872, until October, 1872, Miss Fidelia Lacey was his housekeeper. She was an unmarried women about sixty-three years of age. She testified that he was at times pleasant and agreeable, but on being contradicted, became violent. That Robert Tenant and she anticipated his every want, and did all they could to make it pleasant for him. He had a habit of wiping his nose with his hand, and then feeling of the potatoes in the common dish, from which the others used. Miss Lacey placed two dishes of potatoes on the table, one for him and the other for the other members of the family. "He said there was some iniquity in that." When Miss Lacey and Robert talked together at the table, he asked if there were two 'baboons at the table jabbering. He was excitable and jealous of this old lady and Robert, and tied a string to her door at night, to detect any one entering her room, and finally falsely charged her with tampering with his mail and poisoning him, at which she left. He afterwards, to Mrs. Thompson, charged in substance that Miss Lacey, under the influence of Robert, had mixed poison in his medicine, which he tasted and threw away. He said he did not feel safe or happy during her stay in his house, she was so much in league with Robert.

The next housekeeper was Mrs. Jane Thompson. She was there from October 3d, 1872, until March 4th, 1873. She is a lady of more than ordinary ability, and gave clear and intelligent evidence; and, in the view I take

SHAW'S WILL.

of her testimony, it is all the more important because she was brought from New York city, to testify in behalf of the proponents. She says the old gentleman was intelligent—talked intelligently, but she says, “He would get talking about his relatives. He always spoke well of this young man here (William), but, speaking of the others, he said they would rob him if they could; that they would pick his eyes out of his head.” On her cross-examination, she said: “The first conversation he had with me was as to what a scoundrel Robert T. Shaw had been. He said that he had robbed him, and he said that Miss Lacey had been very disagreeable to him, and he was glad she had gone, and he told how disagreeable his other relatives had been to him. He did not speak of them as being combined against him, but every one of them that had been around him, how foully they had dealt with him. But William was always mentioned by him as the choice of his relatives, and he always complimented him when he went out. He said he was one among a thousand that would do as he did. William was himself kind to him.” There is no foundation whatever, shown in the evidence, for these suspicions as to Robert, Mrs. Lowrey, or any of the others. The evidence shows that they had been uniformly kind and considerate in their treatment of him.

His next housekeeper was his grand niece, Catherine Scott. She came in March, and left in July, 1873. The evidence shows that she was the daughter of a deceased relative of the testator, who was considered by him as his favorite sister, and he expressed himself very warmly in favor of Catherine Scott. She is an educated, high-minded young lady, and he told Mrs. Thompson that Catherine was welcome to stay as long as she pleased. But she had been there only three or four months before he charged her with poisoning him in his coffee, when

SHAW'S WILL.

of course she left his employ. When reasoned with on the subject, he persisted in the assertion that she had poisoned him, and this without the least foundation in fact. On the back of the will now offered for probate is the following memorandum in the testator's handwriting: "Codicil No. 1. Being disgusted by the ingratitude and (some word unintelligible) course of Catherine Scott, she shall not benefit by any property I may have got at my decease."

William H. Shaw drank from the same coffee which the testator thought had been poisoned, and was not affected, and were that not so, had no test been made, no one in his right mind, knowing Miss Scott, would believe for a moment that she was capable of such an act. The testator repeated this accusation against Miss Scott, down to a short time before his death, and seemed to believe it.

After Miss Scott left, in July, 1873, the only housekeeper the testator had, for about two and a half months, was Adelbert Scott, her brother, a little boy about fifteen years old. To him the testator repeated the accusation of poisoning against Catherine.

From October 3d, 1873, to the death of Mr. Shaw, Mrs. Mary Brandow acted as his housekeeper. On the subject of poisoning she says: "He said they (Dr. Bradford and William H. Shaw) wanted to poison him with a glass of wine, and I said, 'For what?' and he said, 'To get me away and get my money,' and he got a suspicion of Dr. Bradford, and dare not go to sleep, and I sat up all night long, and said, 'I will take care of him,' and he did not get to sleep that night until after two o'clock, and he said I was the only one he could depend upon, &c." She further says he offered her \$5 to sit up and watch with him one night. He felt tickled, in the morning, that he was alive. This was before the codicil was

SHAW'S WILL.

executed. She further describes his conduct and conversation, showing that beyond a doubt he was insane at that time. This is evidence given by a legatee, who is to receive \$500 if this codicil is sustained, and nothing if not, and being against her interest entitles it to additional weight as evidence. Dr. Jewett says that as far back as 1871 the testator made charges to him against Mrs. Scott, of poisoning him, for the purpose of putting him out of the way. He said he did not like to live in fear of his life constantly. He appeared in earnest, and proposed to go home with the doctor if he could keep him. The doctor, after hearing the statement of Shaw, did not believe there was any ground for the suspicion, and no sane man would.

Notwithstanding his high opinion of William, so often expressed by the deceased, and his intention to do well by him, as testified to by Snell, and the high character of Dr. Bradford, than whom it is conceded no man stands higher for integrity and moral worth, they both became the objects of this suspicion of poisoning, and were discharged before the making of this codicil. In relating his feelings to Mr. Waters, he said: "I asked Dr. Bradford, and I asked to have the neighbors called, and I think Dr. Bradford's reply was that he was not acquainted with the neighbors there. I said, 'Is this a country in which a man is permitted to die like a cat in a strange garret?' They didn't seem inclined to call anybody; there seemed to be a combination between them." He said, "It seemed as if I couldn't get anybody except those that were combined against me." Dr. Bradford had practised medicine nearly fifty-five years, in Homer, near where Mr. Shaw lived, and could not have made that remark; and the witnesses detailed what was said and done; none of them mentioned such a thing as being said by Dr. Bradford or any one else.

SHAW'S WILL.

It may be that I have overlooked some of the charges of conspiracy and poisoning contained in the vast amount of evidence before me. I know that other witnesses have spoken with reference to them, and many facts and circumstances point in the same direction; but enough has been stated to show that before the making of either the will or codicil, now under investigation, the testator's mind was filled with delusions with reference to his nearest relatives, and others who should have been trusted by him.

For the present, I leave out of consideration all evidence of loss of faculties, further than that affecting the question of delusion, choosing, rather, to consider the delusions, as to which there is no conflict of evidence, and see if the will and codicil can be sustained in that view alone.

Another fact should perhaps, be stated here, as bearing upon the condition of the testator's mind at the time, more particularly, of making the codicil, and with such force as an afterward proved fact should have upon the will itself. All the evidence shows that the testator had a strong dislike of Dr. Head. Whether such dislike was founded in reason or not, does not clearly appear, and is not important. According to the evidence of Mrs. Thompson, Mr. Shaw considered Dr. Head a snake in the grass. When he was in Shaw's room, Shaw would come out into the kitchen and shut the door, and say he was tired out by that man, and he wished he would go away. She says she knew Shaw had no confidence in him. He once went in and found the doctor writing in his room, when he seized him by the arm and said, "What are you doing?" A number of times when the doctor went into his room, the testator would leave the table and go in as though watching him. He once said to Head, when he came near him, "Sit back; I don't

SHAW'S WILL.

feel safe in your presence!" and other similar remarks, showing he did not like him. This continued while Mrs. Thompson remained there. But a little over a week before this codicil was made, for some reason which is unexplained, Dr. Head was taken into the confidence of Mr. Shaw, when the charge was soon made by Shaw that Dr. Bradford, who had visited him frequently for a year and nine months, and with whom he had visited and ridden out, had, with William, been guilty of poisoning him. He saw vines growing out of Dr. Bradford, which satisfied him that he had poisoned him, and they were both discharged, and Dr. Head made his physician. The codicil was made in eight days after, and Dr. Head was made a legatee to the amount of one thousand dollars, and that not in payment for his services, which are still a charge against the estate. This sudden conversion of a dying old man to Dr. Head, whom he so despised and dreaded, and seeing vines darting out of his physician, Dr. Bradford, being simultaneous, is to say the least, a remarkable coincidence. It seems to call for an explanation, which Dr. Head has not given. From that time until the codicil was made, Dr. Head was very attentive to Mr. Shaw, considering him, as he told Dr. Hyde, his patient, and was conveniently in the adjoining room when the bequest of \$1,000 was made to him. At this point I cite, *Seaman's Friend Society v. Hopper*, (33 N. Y., 619,) as bearing on this case, and also *Tyler v. Gardiner*, (35 N. Y., 559); *Forman v. Smith* (7 Lans., 443).

The law starts out with the presumption that every man is sane. That is the normal condition of mankind, and when the acts of a person, whether in making a deed, a contract, a gift or a will, are assailed, on the ground of insanity or incompetency, that insanity or incompetency must be shown by the person alleging it,

SHAW'S WILL.

by sufficient evidence to overthrow the legal presumption. This principle is elementary. (*DeLafield v. Parish*, 25 N. Y. 97; *Matter of Forman*, 54 Barb. 275; *Tyler v. Gardner*, 35 N. Y., 559; 4 *Keyes*, 10.)

But when delusions are shown before the execution of the instrument, naturally affecting its provisions, the burden is shifted upon the proponents to show that they did not exist when the instrument was executed. (1 *Paige* 171; 5 *Johns.*, 159; 4 *Cow.* 207; 4 *Bradf.*, 226.)

It is another principle of law that no matter how wilful, stubborn, or obstinate a man may be, if he be sound in his mind, he may make a will and dispose of his property as he pleases. The question in such cases is, did the conduct result from insane delusions, which is insanity. (*Matter of Forman*, 54 Barb., 274.)

Again, if a man has delusions, which in no way affect the disposition of his property, he may still make a valid will. (*Stanton v. Wetherwax*, 16 Barb., 263.)

And so, though he may have exaggerated and absurd opinions, which do not affect his mind in the direction of the disposition of his property. (1 *Redf.* 89, 90 and 142; 21 Barb., 197; 54 Barb., 274.)

"Setting aside dementia or loss of mind and intellect, the true test of insanity is mental delusion. If a person persistently believes supposed facts which have no real existence, except in his perverted imagination and against all evidence and probability, and conducts himself however logically upon the assumption of their existence, he is so far as they are concerned, under a morbid delusion; and delusion in that sense is insanity. Such a person is essentially mad or insane on those subjects though on other subjects he may reason, act and speak like a sensible man." (*Dew v. Clark*, 3 *Add. ecc. R.* 79.) If the deceased in the present case was unconsciously laboring under a delusion as thus defined, in respect to

SHAW'S WILL.

Robert Tenant Shaw and the testator's sister, Mrs. Lowrey, and his other family connections, or as to the two named alone, they being persons who would naturally have been the objects of his testamentary bounty "when he executed his will, and the court can see that its testamentary provisions were or might have been caused or affected by the delusion, the instrument is not his will, and cannot be supported as such in a court of justice."

The conduct and designs which he imputed to his nephew, sister and relatives were such as, upon the assumption of their existence, should have justly excluded them from all share in the succession to his estate. I have taken the last proposition almost literally from the opinion in *Seaman's Friend Society v. Hopper* (33 N. Y. 619.) as showing the view of the court of appeals on a similar state of facts. This view of insanity is taken by Drs. Gray, Hammond, Kellogg and all the other medical experts called in the case on both sides. And what gives more weight to their opinions is the fact that there is no substantial difference in their opinions on this question. In the clear and concise language of Dr. Gray, "Delusion is the very essence of insanity." Under the evidence in this case, can there be any doubt that there was delusion in the belief that Robert Tenant Shaw, who had for many years been in intimate relations with the deceased, was "an impostor and not related to" him? Is there anything tending to justify the suspicion that Robert Tenant Shaw had "by lying and other shameful deceits and wrongs deceived and injured" him? If so, why did he afterward take him into his family and employ only to turn him off again with a further charge of poisoning? Is there anything proved in this case showing any cause for the suspicion that Robert and Mrs. Lowrey were combined

SHAW'S WILL.

to get his property? I have searched in vain to find it in the evidence in this case. And yet that delusion and all those delusions existed at the very time when this will was executed. And for the most part of it we have Mr. Shaw's own writing as proof.

It is no answer to say that Mrs. Lowrey was remembered in the codicil the same as in old wills, and therefore these delusions as to her cannot effect the will, because they have not changed the result. If when the will was made he had a delusion which would naturally affect the disposition of his property, the will is not his will, and will not be sustained by the courts (*Cotton v. Ulmer*, 6 *Am. Repts.* 703). Nor is it any answer to the objection made to the codicil that Mr. Shaw had shown by his will that he intended to exclude Robert Tenant Shaw, antecedent to the delusions which were more fully developed just before the making of the codicil, because he would not have been included in the codicil had those latter delusions never existed. This is expressly held after full discussion in the case last cited. The reasoning of the court in that case is such as to commend itself to my mind, as sound law. It has been well said in New Hampshire: "The will of a person affected by insane delusions ought not to be admitted, if he has disinherited his family without cause, or looked on his relations as enemies; has accused them of seeking to poison him, or the like; in all such cases where the delusion exercises a fatal influence on the acts of the person affected, the condition of the testamentary power fails, the will of the party is no longer under the guidance of the reason, it becomes the creature of the insane delusion." (*Pitcock v. Potter*, 8 *Am. R.*, 190, *note.*)

As bearing on this question of delusions as to his relatives, it is important that the testator does not by his will and codicil show a mere preference between rela-

SHAW'S WILL.

tions or objects of his bounty. With an estate of over \$300,000, he gives about \$11,000 to his relatives and not knowing what he would do with the balance, he bequeathes it to his executors, in trust for such charitable purposes as THEY shall determine. His purpose seems to have been to deprive his relatives of it even, though he had no choice where it should go. Others were to furnish the judgment, to say what should be done with the fruits of his labors and privations for almost a century. He instructed his draughtsman, Mr. Waters, to insert an especial disinheriting clause as to his relatives, which he did; and to my mind that and the residuary clause give more conclusive evidence of his insanity than any number of witnesses who might speak from appearances alone. Then by his codicil he increases the bequests to his relatives to about \$29,000, and certain real estate, with \$2,000, to two societies, and \$1,000 to Dr. Head, in all \$32,000 or one-tenth of his estate, and then says the residue shall go to his executors absolutely. If he knew what he was about when he signed this codicil, he intended to take about \$275,000 from his relatives, where it would naturally go, and give it to three persons in no way related to him, and to whom he was under no special obligations either legally or morally, to believe that he would do which, in his sane moments, is overtaxing human credulity. It is opposed to all the natural instincts, which in sane men favor relatives in preference to strangers. On the assumption that he, as a literary, charitable, and benevolent man, intended to bestow on those objects, this codicil shows on its face that he had not the capacity to comprehend what he was doing. What charitable, benevolent, literary, or religious society or institution could lay any claim to this large fund, or any part of it, were it to pass into the hands of these executors, under either

SHAW'S WILL.

the will or codicil? Taken together, the will and codicil are simply a disinheriting document, showing that if he comprehended what he was doing, it must have been prompted by the worst of feelings toward his family, which is confirmatory of the theory of delusions. (*Marvin v. Marvin*, 4 *Keyes*, 22; *Peck, v. Cary*, 27 *N. Y.* 9.) The fact that this will disinherits most of the nearest kindred and relatives, is a very strong circumstance to show that the testator was not in possession of all his faculties, so as to appreciate what he did within the rule laid down in *Delafield v. Parish* (25 *N. Y.* 9.) and *Forman v. Smith*, (7 *Lans.* 447.)

As we have seen by his former wills, the testator gave all his estate to his relatives. As Judge Miller, speaking for the court, says (7 *Lans.* 450, of opinion): "He thereby recognized their claims upon him, and that he then retained toward them the affectionate regard which was due to the ties of consanguinity which bound them together." This change, whereby he takes it from its natural course—from the course he all along intended—and gives it to strangers in blood, without providing even for the objects which it is claimed he had in view, is very strong evidence of his incompetency.

It is no answer to this claim of insanity that he was able to do his accustomed business even accurately, and converse intelligently, to near the date of codicil. All the medical experts tell us, what is but confirmatory of our own observations, that the insane, outside of the subject of their delusions, can transact their accustomed business as well as ever. This does not apply to cases of profound dementia, for there the faculties are entirely worn out and destroyed. In the first stages of dementia the subject may do his accustomed business from mere force of habit; but when profoundly demented he cannot. Where, however, delusions exist, so that the sub-

SHAW'S WILL.

ject is what is commonly known as a monomaniac, there is no loss of power to do his ordinary business not connected with his delusions. If he is a mechanic, he will do mechanical work well, though he may have the delusion that he is Jesus Christ. If he is a money-lender, he will let money, examine securities, and make memoranda, though his house may be filled with pistols to ward off the relatives who are combining against him for his property. But in the one case, he would not be permitted to bequeath his mediatorial seat to his relatives, and his worldly and more substantial property to others, nor in the other, to give the tenth part of his property to certain relatives and nine-tenths to strangers in blood. If a man is insane—which is evidence, by delusions—he cannot dispose of his property, if such disposition may be controlled by such delusions. Where the testator has the delusion that his relatives, or any of them, are combining against him, or that they or any of them are impostors or not related to him, or that they are his enemies, or are trying to get some advantage of him or to get his property, or to injure him in any way, and he refuses to be reasoned out of the delusion, and continues to believe in it against evidence and probabilities arising from their relationship, acquaintance and conduct, and the delusions are without foundation in fact, he is insane, and his will will not be sustained by the courts.

I have thus far considered some of the evidence bearing upon the question of insane delusions. There is one other question which has occupied much of the time of the court, and as to which a large number of witnesses have given their testimony. Was the testator, at the time of making this will and codicil, or either of them, so profoundly demented as to be incapable of making a will? This, to my mind, presents a more diffi-

SHAW'S WILL.

cult question than the other, especially so far as the will is concerned, chiefly because of the conflict of evidence.

Dr. Gray defines dementia as a "state of enfeeblement of the mind or impairment of the mind. Dementia is usually the result of the other forms of insanity." It is an unsoundness of mind as much as mania, and when it is profound, it is more likely to affect the entire mind.

All the facts in this case taken together, satisfy my mind that when this codicil was made on the 11th day of December, 1873, nine or ten days before his death, the testator had become profoundly demented. He was at that time nearly, or quite, ninety years of age—twenty years beyond the allotted time of man. He had been some considerable time sick with what has been called his last sickness. He had had sinking spells, the day before, and telegrams and letters were sent to his relatives, to come and see him, for he was dying. He had so far lost his mind, that some time before, he had seen vines growing out of his physician and, out of the wall, and believed that the vines growing out of his physician indicated that he had poisoned him. He had become entirely thoughtless and careless as to his appearance, sitting with his clothes unbuttoned and his person exposed in the presence of ladies, without any concern. In his habits in his bed, on the floor, and in his clothes, like a young child, making it necessary to clean and care for him like an infant, and when this was done by a female, he showed no more embarrassment than a child. He would use his hands, and then rub his face in a most disgusting manner not fit to be described. When the codicil was drawn, he did not know the name of the woman who had cared for him and been his chief companion for over two months, and whom he had called by her given name, Mary, for all that time. She says, "After William left, (December 3d, 1873,) he

SHAW'S WILL.

run down awful fast." His bed had to be changed a dozen times in a day and night. For a long time before the codicil was made, he would sit at the table and permit the dripping from his polypus to drop into his soup, or milk, or tea, or on his plate and he did not notice it but kept on eating as though nothing had occurred. He would wipe these drippings from his nose with his hand, and then pinch all the potatoes in the dish, from which others ate, and take cakes from the common dish with the same hand regardless of its nauseating effect upon others. He would drop \$200 or \$300 on the floor at a time, and forget it. He had a safe in his house for the deposit for valuables, and yet so demented, so forgetful, and careless had he become, that after his death the small fortune of over six thousand dollars in bonds was found packed away in an unusual place with old and worthless papers, the coupons not having been cut for a considerable time, and evidently forgotten; and an inventory of bonds found among his papers, and the evidence given, show that but a short time ago he had a large quantity—over \$50,000 of bonds which are unaccounted for and unfound. He neglected the interest on his securities for the last two or three years. He was forgetful, and would say a thing, and the next moment forget all about it, even in speaking for a drink. William was as kind to him as he could have been to his own father, and yet he believed that William had poisoned him. He believed he saw handbills on the wall when there were none there. He thought he was being poisoned by Dr. Bradford and offered Mrs. Brandow \$5 to sit up and watch by him through the night. He said to Mrs. Brandow "You would not be such a wretch as that" (to poison him.) He said he dared not to go to sleep because he was afraid Dr. Bradford would poison him: he said he was feeling tickled to think he found himself alive in

SHAW'S WILL.

the morning, and many other like things; he, without appearing to notice the difference, signed the codicil by the residuary clause of which about \$275,000, attempted to be given by his will to his executors in trust for charitable and benevolent purposes, was given to his executors absolutely for, their own use, and this without any comment or suggestion from him, as to any change; and while he clung to the key to his safe to the last, showing that "the ruling passion is strong in death," yet he permitted two men, five days before the codicil was made, to take his entire property from his safe and to carry it away uncounted and uninventoried and without even taking a receipt for it, or anything to show who had taken it, or what they had taken.

The circumstances above stated occurred before the execution of the codicil, and proves to my mind very conclusively that he was then profoundly demented, and incompetent to make a testamentary disposition.

In *Forman v. Smith*, (7 *Lans. R.* 443), the general term in this district held: "To enable a person to dispose of his property by will, it is not enough that he should be found to be possessed of some degree of intelligence and mind; he must in addition, have sufficient mind to comprehend the nature and effect of the act he is performing." (See also *Delafield v. Parish*, 25 *N. Y.* 9; *S. C.*, 1 *Redf.*, 1.)

The doctor tells us that when a man is once profoundly demented with senile dementia, he does not recover. I have not mentioned the facts connected with the refusal to cut the willows, the painting of the house, the killing of the hog, nor the seeing of the vision; because the doctors disagree, or, at least, some of them say they are not of much value in determining this question of sanity. None of the questions as to the effect of his doing his business arise in discussing this codicil, for he ceased to

SHAW'S WILL.

do business for some time before that instrument was executed ; and Dr. Hammond, the witness for the proponents, says, a man may be competent to do business one day, and dementia may begin the next, and be noticed soon after. I am satisfied that on either ground—insane delusion or dementia—this codicil cannot be sustained. He was, on the 11th day of December, too far gone, to be permitted to make a disposition of property.

I am not so clear that he was profoundly demented when the will was executed, on the 8th day of February, 1872. The evidence is very conflicting upon that question. Many witnesses speak of his condition before that time, and more soon after, and describe the testator as anything but fit to do business. This is testified to by men who did business, or attempted to do business, with him. He was evidently far down the decline of life ; was weak in body, and, to some extent in mind ; he was filled, as we have seen, with delusions ; his house was an arsenal of fire-arms ; he was, at times, peevish, and would not bear contradiction ; there was a marked change observed in his habits, from neatness and propriety, to slovenliness ; he did not observe the proprieties of life as formerly, and he did many foolish and filthy things.

But I was much impressed by the evidence of Chancellor Winchell, Bishop Peck, and Profs. French and Bennett, as to his intellectual conversations, outside of his ordinary business. They are keen observers, and high-minded, intellectual men. They are accustomed to mingle with and weigh men, and are above the suspicion of bias. They say he showed remarkable intelligence, for a man of his age, on the subject nearest their heart, the endowment of literary institutions. He promised to do something for the Syracuse University,

SHAW'S WILL

and seemed much interested in it, and this case would have presented quite a different aspect, had he carried out his intent in the codicil. He wrote business letters after the will was executed, which are produced before me in his own handwriting. He carried on his large business transactions for over a year, at least; some of the time having aid from Robert Tenant and William, but doing much of it himself. Over a hundred people—men and women of character, have testified to having done business with him. Some say he did it well, and some say he knew next to nothing. I think from all this evidence I should not be authorized to say that he was so profoundly demented when the will was made, as to render it void. Were that the only question in the case, I should be disposed to sustain the will, but not the codicil. In my view, as before shown, however, the will, too, is void, by reason of his insane delusions and mania.

I am cited by the counsel for the contestants to the case of *Seaman's Friend Society v. Hopper* (33 N. Y., 619) and asked to hold on the authority of that case that the only parties present at the drawing of the codicil, being beneficiaries under it, and other persons having been excluded, the codicil is void for fraud and undue influence. Much time on the trial and argument was consumed on that question. But I decline to enter upon a discussion of it, further than I have already hinted. There is much that might be said, but if this case goes to the upper courts, the facts of this and the law of that and other cases will be before the court, the one to be applied to the other as to the court shall seem proper. They will not fail to characterize it properly.

I have examined this case with all the care which its importance to individuals and the public seems to demand, and I am thoroughly satisfied that neither the will nor the codicil is the act of a man who had what

FREEMAN v. FREEMAN.

the law terms testamentary capacity, and that such want of capacity has led the testator to attempt to transfer this large property from its natural channel to three persons not related to him.

The probate of both should be refused.

Decree accordingly.

CORTLAND COUNTY.—HON. A. P. SMITH, SURROGATE. — MAY, 1874.

FREEMAN v. FREEMAN.

Matter of final accounting of SAMUEL FREEMAN, JR., administrator of the goods, &c., of SAMUEL FREEMAN, deceased.

While considerable latitude will be allowed an administrator in the payment in good faith, of the intestate's debts, even if of doubtful validity, yet a payment to the administrator's own wife, of an alleged debt, long barred by the statute of limitations, and which she could not, as a married woman, have recovered in law, will not be allowed to the administrator on a settlement of his accounts.

THIS was a proceeding for the final settlement of the accounts of Samuel Freeman, Jr., in which were contained certain charges which he asked to have allowed.

Objections were made by the heirs and next of kin.

H. CRANDALL, *for the administrator.*

H. C. MINER, *for the objectors.*

THE SURROGATE.—[After disposing of several objections to the account.] The next item objected to is \$424.99, for services alleged to have been rendered by her, in the family of the decedent, prior to the year 1841.

[After reciting the evidence before him as to the nature of the services and the circumstances under which they were rendered, the Surrogate proceeded.]

FREEMAN v. FREEMAN.

The account was originally \$200, and the balance is for interest. It was at most an unliquidated demand which had never been stated to the intestate, and therefore did not draw interest, though it was held to be a valid claim. But as I understand the law, Mrs. Freeman never had any legal claim against the intestate which she could enforce against him, and therefore a payment to her, by the administrator, was without authority and a nullity. There is ordinarily some latitude to be given to administrators where they have paid debts in good faith, and the courts are disposed to favor them even when they have mistakenly allowed a doubtful claim, on the ground that acting in a representative capacity they should not be made personally liable for mistakes. But this is not a case calling for the application of that rule. This is a claim paid by the administrator to his own wife.

When this work was done, even if performed under such circumstances as to constitute a claim, which I doubt, this wife was a married woman. It was before the act of 1848, and all her services and personal property belonged to her husband. She could not have maintained any action against the intestate. He did not employ her, and his promise to pay her, made after the labor was performed, was without consideration, and void. She was not even claiming any pay at that time, and knew nothing of the promise made to her husband, until it was communicated to her by the latter. Whatever the father said, if it could be construed into a promise, was a mere naked promise, without consideration, and not binding upon him or his estate. Again, there is nothing to take the case out of the statute of limitations, and good faith required that this husband should not have paid this stale and barred claim to his wife. He cannot be allowed any portion of this item

GAZLAY v. CORNWELL.

of \$424.99. It will be stricken from the credits claimed in his account.

Ordered accordingly.

CORTLAND COUNTY.—HON. A. P. SMITH, SURROGATE.—
SEPTEMBER, 1874.

GAZLAY vs. CORNWELL.

Matter of the Estate of LYDIA CORNWELL, deceased.

The decedent's husband, by a former wife, had one daughter, G., who died before her mother, leaving children. The decedent died leaving sisters, but no husband, parent or child. *Held* that the decedent's sisters were her only next of kin. The children of G. can not participate in the distribution of the estate, because they are in no way related to the decedent. Relationship is the ground on which the law of distribution is based.

THIS was an application to determine who are the legal heirs and next of kin of Lydia Cornwell late of Cortland, deceased, intestate. She died in December, 1872, leaving sisters, but no husband, parent or child. Her husband, Elihu Cornwell, by a former wife, had one daughter, Mrs. Gazley, who died in 1859, leaving a husband, Dr. Gazlay, and three children, who now claim the estate, of Mrs. Lydia Cornwell. After the death of his first wife, Elihu Cornwell married Lydia, by whom he had one daughter, Ann Janette Cornwell, who died unmarried and intestate in 1866, leaving no children, and no brother and no sister or sister's children except those three Gazlay children, the heirs of Mrs. Gazlay, her half sister.

HORATIO BALLARD, *for* GAZLAY children.

W. H. SHANKLAND, *opposed*.

THE SURROGATE.—The only question I am now called upon to decide is, whether these children, or Lydia's

GAZLAY v. CORNWELL.

brothers and sister are entitled to her estate. Elihu died before his wife or daughters.

The statute of distributions (3 R. S. 183, § 82,) provides as follows: "Where the deceased shall have died intestate, the surplus of his personal estate remaining, after the payment of debts, *shall be distributed to the widow, children or next of kin of the deceased*, in manner following;" Then follow thirteen provisions or limitations as to such distribution. It will be seen that all these provisions are subject to the one above stated. The persons receiving the estate under any of them must be either the "*widow, children or next of kin of the deceased*."

These Gazlay children are in no way related to the deceased. Her blood does not run in their veins. It is claimed that they take as representatives of Ann Janette. Were this a question over property left by Ann Janette there would be force in the suggestion; but Ann Janette never acquired any of the property of her mother. She died before the intestate, and in my view of this question it is to be decided as though she had never lived. These children are not asking this property on the ground that it was the property of Ann Janette, but that they are her legal representative and entitled to all the property that would have been hers had she outlived her mother. This however, in my view of the case, does not arise, because they are asking for the property of one to whom they are in no way related, and relationship is the ground on which the law of distribution is based. Where that exists, then half bloods take the same as whole bloods. Where there is no relationship between the deceased and the claimants that rule does not apply.

If I am right in this view, this property belongs to the brothers and sisters of the intestate, and not to the Gazlay children. An order to that effect will be entered.

Ordered accordingly.

CAMP v. CAMP.

TIoga COUNTY.—HON. CHARLES A. CLARK.—SURROGATE.—
FEBRUARY, 1876.

CAMP v. CAMP.

*In the matter of the final accounting in the estate of SYL-
VESTER CAMP, deceased.*

Where a person having made advancements to his sons and daughters, in different sums, at their request, during life, taking receipts expressing such sums to be a part of their apportionment of his estate, afterwards makes a will appointing executors, but making no testamentary disposition other than a direction that all his property be equally divided between his children, such advances must be taken into account in the distribution of the estate.*

THIS was a proceeding for the final accounting of the estate of Sylvester Camp, deceased.

The testator died on the 28th day of June, 1873, in the County of Tioga, having on the 1st day of February, 1872, executed a will in which he appointed his son, Nathan P. Camp, and his daughters, Mary Merser, ean and Marinda Marean, executors; and directed them to collect together all his personal estate of every name, and nature, and sell the same to the highest bidder—together with all his real estate; and the avails thereof to be equally divided between his ten children: Oliver Camp, Mary Mersereau, Lovisa Storms, Marinda Marean, Emeline Jerome, Nathan Camp, John Camp, Chester Camp, Diana Camp, and Jane Harris.

He had previously advanced various sums to his children, taking a receipt for each advancement in such form as to show clearly that the contract between him

* Where the direction was that the fund be *equally* divided among the donees, as if the testator had died intestate, and their relation to the testator, is such that they would take *unequally* under the statute, they will take *unequally* under the will. (Murdoch v. Ward, 8 Hun. 9.)

CAMP v. CAMP.

and his children, was that out of their respective portions or shares of his estate, there was to be deducted the sum so paid. The receipts were as follows :

“Received, Campville, March 19th, 1867, of Sylvester Camp, Two Hundred Dollars, as part of my apportionment, to be deducted out of the estate of said Sylvester Camp.

“*Emily Jerome.*”

The receipts were for varying amounts, but were all expressed as above, except some which were more briefly expressed “as a part of my apportionment of his estate.”

These receipts or contracts showed that to his daughter, Mrs. Jerome, had been advanced \$200; his son, Oliver Camp, \$1,036.87; his son, Chester Camp, \$783.33; his daughter, Mrs. Storms, \$180; his son, Nathan P. Camp, \$500; his daughter, Mary Mersereau, \$200; his son, John Camp, \$560; his daughter, Dianna Camp, \$100; his daughter, Mrs. Harris, \$200; and to his daughter, Mrs. Marean, \$190.

The deceased, in his will, simply appointed executors and gave them certain directions, and among the directions, one to bring all his property in hotchpot and divide it equally among his ten children. He did not by his will otherwise give, bequeath, or devise, his property or any part of it, but died totally intestate, so far as his estate was concerned, except the appointing of executors to manage the same, and the direction to them to distribute, according to the statute.

F. B. SMITH, for those of the children who had received the smaller sums.

CHARLES E. PARKER, for OLIVER CAMP, and others, opposing the taking of the gifts or advancements into account, relied on 2 Sandf. Ch., 120.

THE SURROGATE.—There is no will in this case dis-

CAMP v. CAMP.

posing of any part of the property differently than it would be disposed of, if the deceased had died totally intestate.

There probably can be no doubt, but that, as a principle, the Statutes of the State of New York, concerning advancements, apply only to the estates of intestates; that the statutes distribute the individual's property who has not distributed his own, (1 R. S. 754. § 23,) although the Statute reads, "Every estate or interest given by a parent to a descendent, by virtue of any beneficial power, or of a power in trust with a right of selection, shall be deemed an advancement to such descendent." (1 R. S. 737, § 127.)

In this case, the deceased held a contract from each of his children, that they would account to his legal representatives upon the settlement of his estate, for so much as they had respectively received out of their said several shares of his estate.

Now if he had intended in the will to have forgiven each of these his children, the sums they had so been advanced, how easy it would have been to express it in the will. But, the language of the will has no such import. (*Van Alstyne v. Van Alstyne*, 28 N. Y. Rev. 375).

The sons have received sums differing from each other, and the daughters have received sums differing from each other, and differing from the sums received by any of the sons, and there is nothing indicating that the deceased intended any such discrimination between his children, but everything indicated, on the contrary, that his intention was an equal distribution of all his property among his ten children, he having made no bequests or devises in his will, but having simply given a direction to the executors what to do in relation to his property, and simply adding, "the avails thereof to be equally divided between my ten children." This is

MATTER OF GATES.

no disposition of it, or any part of it, by will, any more than it would have been, had he added to the directions given his executors. that the avails thereof were to be divided between his ten children according to the statute.

And the sums advanced to each of these ten children are parts of his estate, and must be so considered in the distribution of his estate (2 R. S. 97, §§ 76, 77,) and the order on the final accounting will be entered in accordance with the view of the case as herein expressed.

Ordered accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE,—
AUGUST, 1871.

MATTER OF GATES.

*In the matter of the final accounting of AMOS W. GATES,
administrator of CARLTON GATES, deceased.*

The power of the Surrogate to award costs does not authorize him, on an accounting of an administrator, appointed in a case of intestacy, to award costs of the counsel for proponents of a will which had been refused probate.

The Surrogate cannot award costs to any person not a party before him. If the Surrogate makes such allowances, even by consent of counsel, and they are paid by the executor or administrator they must nevertheless be stricken out, if objected to on his final accounting.

THE administrator in this matter is the father and only next of kin of the deceased, whose will was refused probate by the Surrogate in June, 1870; thereupon letters of administration were issued to Amos W. Gates.

The administrator recently presented a petition for a final accounting, and, among others, cited William Romer, who claims to be a creditor of the intestate.

MATTER OF GATES.

On the return of the citation, the administrator failed to present or file any account of his proceedings, and thereupon Mr. Romer claimed that the administrator had neglected to comply with the requirements of an order made by the Surrogate, allowing him \$1,500 for his services as proctor and counsel for the proponents of the rejected will, and directing it to be paid out of the estate; and he now asks that such letters be revoked unless he comply with the order by paying him the above sum.

It appears, from the proceedings had before the Surrogate, that Mr. Romer appeared as proctor and counsel for the proponents of said alleged will, on the return of the citation, and on the next day, to which the matter was adjourned, but not subsequently; that the taking of the testimony in regard to the validity of the alleged will occupied many days subsequent to the last appearance of Mr. Romer's name on the record; that ultimately the alleged will was refused probate; that in the order rejecting it a provision was inserted directing the costs and expenses of all the parties to be paid out of the estate, the respective amounts to be fixed by an order to be thereafter made. Shortly thereafter, an order was made and filed fixing the sum to be allowed to each counsel engaged in the matter, Mr. Romer not being named among them. In December, 1870, the Surrogate made another order allowing Mr. Romer \$1,500, as above stated.

The counsel for the administrator insists that this last order is illegal and cannot be enforced, because the Surrogate had no power to make it.

WILLIAM ROMER, *in person*, and by J. W. MILLS, *of counsel*.

R. W. VAN PELT, *for administrator*.

THE SUREOGATE.— This is the first occasion I have

VOL. II.—10.

MATTER OF GATES.

had to examine into the question of costs and allowances in this court. I have now given it some consideration, and, without going into any minute history of the subject, I find that before the adoption of the Revised Statutes, Surrogates had no power to award costs, and that an order awarding costs was *coram non judice* and void. (*Reid v. Vanderheyden*, 5 Cow. 719.) On the adoption of the Revised Statutes, however, power to award costs in cases of contests before them was given, but such costs had to be taxed at the rates allowed in the Court of Chancery for like services. (*Halsey v. Van Amringe*, 6 Paige, 12.) In 1837, an act was passed directing such costs to be taxed at the rates then allowed in Courts of Common Pleas, and such is still the law. (*Derin v. Patchin*, 26 N. Y., 441)

In the case of *Halsey v. Van Amringe*, (*supra*), the Chancellor held that the Surrogate was not authorized by the Revised Statutes to make an arbitrary allowance for services and counsel fees, to be paid by one party to the other, without reference to the taxable costs allowed for similar services in other courts, and the doctrine is reaffirmed in 1 *Barb. Ch.* 77, and in *Lee v. Lee*, (16 *Abb. Pr.* 127.)

The claim of Mr. Romer being for services rendered on behalf of the proponents of the will during the contest relating thereto, does not constitute him a creditor of the intestate, so far as this claim is concerned. The only creditors to whom I am authorized to decree payment on a final settlement are those whose claims arise on contracts made with the deceased. Whatever claim he may have in this regard is against the administrator, and I have no power, on this or any accounting, to decree its payment. The order allowing Mr. Romer a gross sum for his costs and services is wholly unauthorized by any statute I have been able to find, and it was not in

MATTER OF GATES.

the power of the parties to the litigation to make an agreement in reference thereto, on which he could base a claim against the estate of the deceased. Again, this order under which Mr. Romer claims, is invalid, for the reason that in a proper case the Surrogate can only award costs to a *party*, and not to counsel of parties, and then, only in the mode and to the extent allowed by the statute. (*Willcox v. Smith*, 26 Barb., 316.) In this last case, it seems that allowances to counsel were made by agreement of counsel and parties, and were held void.

In the case of *Devin v. Patchin*, above referred to, it appears that the Surrogate of New York directed a gross sum of \$500 to be paid to one of Mrs. Patchin's counsel, and a gross sum of \$150 to another. He also directed the gross sum of \$500 to be paid to one of Mrs. Devin's counsel, and the like sum of \$500 to another. There was an appeal taken from the decree on other questions, but none from the orders awarding these allowances. These orders seem to have been acquiesced in, which is tantamount to a positive agreement of the parties as to these allowances. In that case, the allowances to counsel exceeded the amount of personal estate, as sworn to in the petition for letters of administration. Although these orders in regard to costs were not appealed from, yet the Court of Appeals took occasion to review them, saying that that court could not permit them to go unnoticed, and declared them illegal and unauthorized, and held that Surrogates could not award costs to any person not a *party* before them, and that they could not lawfully act as almoners of the estate of deceased persons. There is this serious objection to making these arbitrary allowances: where a Surrogate makes such allowances, even by consent of counsel, and they are paid by the legal representative, and credited to him in his accounts, as finally rendered, if objected

MATTER OF GATES.

to by any party interested, they must be stricken out and disallowed, and he must account for and pay the same into the fund, although by so doing he has to pay them out of his own pocket. Again, ordinarily, a Surrogate may punish a party for contempt, who refuses to obey a legal order made by him. Can this Court punish a party for contempt, or revoke his letters, because he refuses to obey an illegal order? The statute gives this power to punish for contempt, *only* in case of disobedience to *lawful orders*.

I am aware that a practice obtains in many of the Surrogates' Courts, in various counties, of making such allowances, based on the agreement of opposing counsel, which practice has doubtless sprung from the fact that the existing laws make no suitable provision for costs in these courts; and, although my convictions as to the proper construction of the statute, and as to my duty in this respect, may be distasteful to the bar generally, I must yet, in my judicial capacity, declare these convictions, in order that it may be understood that hereafter I can only award costs in pursuance of the provisions of the statutes, as construed by courts to whose decisions it is our duty to submit.

I have carefully considered the whole subject, and have deliberately arrived at this result. My disposition is to be liberal to counsel, but, in order to be so, I cannot be expected to disregard the plain provisions of statutes, and the decisions of the highest judicial tribunal of the state.

The application of Mr. Romer is denied.

SUMMERFIELD v. HOWIE.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—
DECEMBER, 1872.

SUMMERFIELD vs. HOWIE.

*In the matter of the Estate of JANE SUMMERFIELD,
deceased.*

In proceedings in Surrogate's courts (under L. 1870, Ch. 394) for the search and seizure of property of the decedent alleged to be withheld from the administrator, the Surrogate has no power to try the question of the title to the property in dispute.

THIS was a proceeding under chapter 394, of the laws of 1870, for the examination of a person alleged to have property of the deceased in his possession which he refused to deliver to the administrator.

S. D. GIFFORD, *for the administrator.*

W. HERRING, *opposed.*

THE SURROGATE.—By an act passed April 27, 1870, Chap. 394) the additional power is conferred upon Surrogates to subpoena and examine certain persons who are alleged to conceal or withhold property that was possessed by deceased persons at the time of their death or of which they were possessed within two years prior thereto. "Such person shall be sworn truly to answer all questions concerning the estate and effects of the deceased, and shall be examined fully and at large in relation to said effects." (§4.)

Section five provides that if it shall appear to the Surrogate that any effects of the deceased are concealed or withheld, and the person having the possession of such property shall not give the security provided in the next section, the Surrogate shall issue a warrant to the sheriff, or a constable, to search for, seize and deliver the same to the executor or administrator.

SUMMERFIELD v. HOWIE.

Section six declares that such warrant shall not be issued, if the person in whose possession the property may be, shall give a bond with sureties to the executor or administrator conditioned that he will account for and pay the value of such property to the executor or administrator, whenever it shall be determined, in any suit to be brought by said executor or administrator, that said property belongs to the estate of such deceased person.

In this matter, it is shown that the person subpoenaed, Mr. Howie, has in his possession a mantel clock which belongs to, and was in the possession of the deceased on the day of her death. The counsel for Mr. Howie, proposed to cross-examine his client with a view to showing that the clock was given to him by the deceased; in other words, to prove the title to it in himself. To this the counsel for the administrator objects on the ground that it is not competent for this court to adjudicate upon the question of title to the property.

The object of the statute is, apparently, to furnish a speedy and summary mode of enabling legal representatives to obtain possession of property alleged to belong to estates they represent, where the same is concealed or possessed by others. It provides for the examination of no witnesses other than the person or persons alleged to conceal or withhold it. Hence, it is plain that this court has no power to try the question of title. This becomes more apparent on examining the sixth section, in which the condition of the bond to be given, is prescribed to be, that the obligor will pay the legal representative the value of the property, if in any suit to be brought by him, it shall be determined that the property belongs to the estate of the deceased.

I regard it as the duty of the Surrogate, in case he is satisfied from the testimony of the person examined, that there is any reasonable ground to believe that the prop-

HART v. DUFFY.

erty belongs to the estate, to issue his warrant as directed by the act, unless the requisite bond be given.

The objection sustained.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—
OCTOBER, 1874.

HART v. DUFFY.

*In the matter of the final accounting of JOHN DUFFY and
EPHRAIM SOURS, Executor, &c., of PHILIP DUFFY,
deceased.*

A decree settling the account of an executor, &c., will only be opened on petition for that purpose, alleging proper grounds therefor, such as default, mistake, accident or error.

The Surrogate will not, after a lapse of six years from the final settlement of an executor's accounts, compel the executor to account for portions of the estate alleged to have been purchased by the executor himself or otherwise improperly applied, where it appears that such purchase and application of funds were made with the knowledge and assent of the party in whose interest the accounting is sought, a residuary legatee, and that the latter was cognizant of, and consented to, the accounts of the executor as finally settled. *So held* upon an application by a receiver of the property of the residuary legatee.

THE petition alleged that the petitioner, Monmouth G. Hart, was on the 3rd June, 1874, duly appointed receiver of all the debts, property and equitable interests of one Edward Duffy, in an action in the supreme court, in which Michael Daly is plaintiff and said Edward Duffy, defendant; that having executed and filed the proper bond as such receiver, an order was, on the 27th June, 1874, made by the Honorable A. B. Tappen, a Justice of the Supreme Court, authorizing and directing said receiver to institute a proceeding in this court against the above named executor, &c., of said deceased, who was the father of said Edward Duffy and then

HART v. DUFFY.

follow the allegations usual in a petition for a citation to compel executors to render an account and to pay over to said petitioner an alleged interest of said Edward Duffy in the funds of said estate, to the extent of the petitioner's claim.

The executors filed an answer to the petition in which they allege that in Sept., 1868, they had a final accounting in relation to said estate, that all the parties interested, including said Edward Duffy, were duly cited to attend such accounting, and that such further proceedings were had that a decree was duly made and entered at that time, and their account finally settled and allowed; and they further allege that since said accounting no property or effects of the estate have come into their hands, and that none such exist. The executors then produced the records and files of the Surrogate's office which verified the correctness of their allegations relating to said final accounting, including proof of due and proper service of the citation upon said Edward Duffy. It was thereupon insisted on their behalf that the proceedings should be dismissed. This was resisted on the part of the petitioner, it being alleged *aliunde* the petition, that the account, so filed on said final accounting, disclosed the fact that one of the executors had purchased for himself a portion of the real estate of the testator, which the executors were, by the will, ordered to sell. It was therefore claimed that the same still belonged to said estate, and that said Edward Duffy had an interest therein as residuary devisee. It was also claimed that funds belonging to the estate had been used by the executors to pay mortgages upon other lands devised to other devisees, and that those funds having been illegally applied, should now be accounted for by the executors. It was proven that Edward Duffy knew and approved of the sale of the lands to his brother, the executor, at the

HART v. DUFFY.

time it was done, and also knew and approved of the application of the funds to extinguish the mortgages when that was done, that he had a knowledge of the account rendered by the executors on the accounting, and was satisfied therewith, and that he was then about thirty years old. It was also shown that, after the executor so purchased said lot, he erected a house thereon and otherwise improved the property and has since sold and conveyed a part of it, and that all this was done with the knowledge and assent of said Edward Duffy. It also appears that all these transactions, except perhaps the sale of a part of the lot, occurred prior to the accruing of the account on which judgment was obtained against Edward Duffy by Daly.

J. W. MILLS, *for petitioner.*

DANIEL HEIGHT, and J. O. DYKMAN, *for executor.*

THE SURROGATE.—The decree entered on the final accounting in 1868, could only be opened, I apprehend, by means of a petition filed for that purpose, alleging some proper ground therefor. The petition in this matter makes no allusion, either in its allegations, or prayer, to that decree, and was, perhaps, prepared in ignorance of its existence. The only ground upon which a Surrogate has power to open such decrees, is where they were taken by default and to the injury of the petitioner, or where there is an allegation of mistake, accident or error. (*Rev. v. Hastings*, 1 Barb. Ch. R. 452; *Dobke v. McLaren*, 41 Barb. 491; *Sipperly v. Baucus*, 24 N. Y., 46) And the grounds should be alleged in the petition. This court ought, therefore, to dismiss the application, but the petitioner claims that the executor should be compelled to account for the value of the land purchased by one of them, and also for other funds realized from the sale of other portions of the realty which were

HART v. DUFFY.

used to pay mortgages upon other lands specifically devised. I propose to dispose of these questions here.

It is well established by authority, and may be regarded as an elementary principle, that a purchase of lands by executors which they are ordered or authorized by the will to sell, enures to the benefit of the estate, and that any one interested may enforce his rights in regard to them as if they were still unsold (4 *Kent's Comm.* 438 and cases cited.) Is the petitioner in this matter in a position to avail himself of this principle? He undoubtedly stands in the place of Edward Duffy, and is entitled only to his rights as they existed at the date of the judgment, or, at most, of the accruing of the claim on which the judgment is based. If Edward were the petitioner in this matter, I apprehend he would be precluded from making any such claim, because he would be estopped by his knowledge of, and consent given to, the sale to the executor. This act was impliedly and expressly sanctioned by him, and he, with full knowledge, stood quietly by and permitted the executor to go on and improve the lands so purchased by him, and even to sell a portion of them to other parties. It seems to me a clear case of estoppel *in pais*. In such a case, Chancellor KENT (*supra*) says "the *cestui qui trust* is entitled, as of course at his election, to acquiesce in the sale, or to have the property reëxposed to sale." In the case of *Dongrey v. Topping* (4 *Paige*, 94), it was held that where property was sold by order of a Surrogate, and the terms of sale were that a clear and satisfactory title should be given, and the administratrix (the widow) was cognizant of the terms, was present at the sale and joined in the conveyance, she was estopped from claiming dower as against the purchaser. Ignorance of rights on the part of the person making the representations, or acquiescing, will not preclude the application of the estoppel. (9

HART v. DUFFY.

Barn. & Cress. 452; 1 *Story's Eq. Jur.* § 386; *Kingsley v. Vernon*, 4 *Sandf.*, 361.) The same principle, I think, is applicable to the use of the funds of the estate in the extinguishment of mortgages upon lands specifically devised.

Again, Edward Duffy, having a knowledge of all the facts at the time they occurred, would be concluded by his *laches* from opening the account, were it otherwise a proper case for it. The delay intervening is nearly six years, and the court will not interpose where a party has left his rights in a state of repose for so long a period. (*Rogers v. Rogers*, 1 *Paige*, 188; *Sipperly v. Baucus*, *supra*.)

The legal title to the lands in question is in John Duffy. He and his co-executor conveyed them, by virtue of a power contained in the will, to Martin Dowling, who subsequently conveyed them to John Duffy. It seems to me that the petitioner must apply to some other forum, if he desires to have those conveyances declared void so that the lien of his judgment may attach.

Of course, I am not called upon here to pass upon any question affecting the rights of the infant legatee, named in the will.

From the views above expressed, it follows that the proceeding must be dismissed.

Ordered accordingly.

MATTER OF HART.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—
OCTOBER, 1874.

MATTER OF HART.

*In the matter of the application to remove HENRY W.
HART, one of the executors, &c. of JOHN C. HART,
deceased.*

The whole estate consisted of realty, with an annual rental of \$30,000 held by the executor in trust under the will. On an order being made removing the executor in default of his giving a bond, with sureties—*Held*, that the amount of the penalty of the bond required of him was discretionary with the Surrogate.

Held further,—that the sureties on such a bond would not be required to justify in double the amount of penalty.

THE facts are fully stated in the opinion.

THOMAS NELSON, *for petitioners.*

D. W. TRAVIS, *for the executor.*

THE SURROGATE.—An order was recently made in the above matter directing the removal of the executor on the ground that his circumstances were so precarious as not to afford adequate security for his due administration of the estate, unless he should give a bond with sureties as required by the statute. He now proposes to give such bond.

The question now to be considered is, what shall be the amount of the penalty of the bond. Section 20, or 3 R. S., 5 *Ed.*, 157, provides that in such case the Surrogate “shall require such person to give bond with sureties, like those required by law of administrators.” By section 42, of 3 R. S. 161, it is provided that “every person appointed administrator shall, before receiving letters, execute a bond to the people of this state, with two or more competent sureties to be approved by the Surrogate, and to be jointly and severally bound. The

MATTER OF HART.

penalty in such bond shall not be less than twice the value of the personal estate of which the deceased died possessed."

The testator died possessed of about \$7,000 of personal property, and siezed of real estate, mostly in the city of New York, valued at some \$350,000, and producing an annual income of about \$30,000. This real estate is held in trust by three executors, of whom said Hart is one, and they are to receive and apply these rents as directed by the will. It is further provided in the will that said Hart shall act as agent in collecting the rents, keeping the property in repair, &c. He thus acts in a double capacity as agent in receiving the rents and keeping the property insured, repaired, &c., and then he holds, and is to apply, the residue in his character as executor. Of course he may thus control the whole of the rents, as he cannot be compelled to pay over any portion to his co-executors.

The \$7,000 of personal property has been used and applied in the due course of administration, and been fully accounted for on a recent accounting had before me.

I have been unable to find any case resembling this, except that of *Holmes v. Cock*, (2 Barb. Ch. R. 426). There, as here, the personal estate had all been administered, and the only duty left for the executor to perform, was to sell some real estate and distribute the proceeds, as directed by the will. The chancellor says, "the statute has not fixed the amount of the security to be given in such cases, except that it cannot be less than twice the value of the personal estate. (3 R. R. 157, § 20.) But security in double the amount of the proceeds of the real estate which may come into the hands of the executor, for the benefit of others, by virtue of his trust, is not unreasonable where the executor has become insolvent;

MATTER OF HART.

unless the amount is very large. In that case, security to a limited amount beyond the fund to be administered, should be deemed sufficient."

If, however, we are to be guided by the strict letter of the statute above quoted, then the amount of the penalty of the bond would be sufficient, if fixed at \$14,000. But here the reason for the statute rule would not apply, because, at this time, there is no personal property belonging to the estate, and, following the literal language of the statute, a bond with a mere nominal penalty might be regarded as sufficient. It is perfectly obvious, however, that the object of the statute, in requiring an executor, in a case like this, to give a bond, is to secure those interested in the estate from probable loss. It will be observed that the language used in the statute is that "the penalty of the bond *shall not be less* than twice the value of the personal estate," &c. In the other direction there is no limit. It may be ten times the value. Here no sale of real estate is in question, as in the case of *Holmes v. Cock* (*supra*), but only the renting. The rental, as stated, is about \$30,000 annually: the beneficiaries who are interested for life are all young; and the rents to be received by the executor will probably amount to several hundreds of thousands of dollars. It would be oppressive to require the executor to give a bond in a penalty double the amount which, by a calculation based on the annuity table, will be likely to come into his hands. The amount of the penalty of the bond is discretionary, in such cases, with the Surrogate. In fixing it in this matter, as in every other like case, the fact should not be lost sight of, that the end to be attained is to secure the estate against loss. Taking into consideration the power possessed, by any person interested, of calling upon the executor, at any time, and as frequently as the exigency of the case may require, to

MATTER OF HART.

render his account to the court, I shall deem it safe to accept a bond in the penalty of \$50,000. It is true this is not quite double the amount of the annual rents, but even this is a large sum, and amply sufficient, in my judgment, under the circumstances, for the protection of those interested.

The penalty of the bond is accordingly fixed at that sum.

Within the time limited by statute, a bond was presented, in pursuance of the foregoing decision, and the counsel for the petitioners attended before the Surrogate pursuant to notice, to examine the proposed sureties touching their competency. These sureties, some six in number, justified in different sums, aggregating \$65,000. It was then claimed that the bond was insufficient for the reason that the sureties had not justified in the sum of \$100,000, being double the amount of the penalty. The counsel for the executor insisted that a justification to the extent of the penalty of the bond was alone sufficient.

THE SURROGATE.—The statute is silent on the subject, merely requiring “two or more competent sureties to be approved by the Surrogate.” I see no reason why the amount to be secured should require sureties who could justify in quadruple that sum. In the case of *Bennett v. Byrne* (2 Barb. Ch. 1,) the Chancellor held that a general guardian should give a bond in a penalty double the value of the property, &c., of the infant, with sureties, and the Surrogate should require the sureties to justify in at least the amount of the penalty of the bond; and he remitted the proceedings in that matter to the Surrogate, with directions to take a bond in a certain penal sum, with two sufficient sureties who could

FIELD v. FIELD.

justify in the amount of the penalty. He does not say each should so justify, but, in effect, the two together. It is true, the statute provides that the Surrogate shall require of the guardian, a bond to the minor, with "sufficient security" to be approved by him in a penalty double the amount of the personal estate, &c., while in the case of the appointment of an administrator, he shall require a bond "with two or more competent sureties."

Thus, one person in the case of the guardian, who can justify in the amount of the penalty, may be regarded by the Surrogate as "sufficient security," yet he, or the Chancellor, might exact two or more, and then, as in the case of administrators, a justification of both, or all of the sureties together, in the amount of the penalty, is sufficient.

The bond presented is therefore approved.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—
DECEMBER, 1876.

FIELD v. FIELD.

In the matter of the Estate of CHARLOTTE FIELD, deceased.

The duty of counsel to reduce to writing stipulations in the nature of admissions of matters of fact,—considered.

The Surrogate, although authorized by 2 R. S. 96, § 74., upon an accounting, to reserve from distribution a sum sufficient to satisfy a claim against the estate not due, or under litigation,—cannot reserve for anticipated costs of such litigation.

Only claims against the estate, not those against the executor or administrator, can be reserved for, under that section.

In computing the amount of assets in the hands of the executor or administrator, when a judgment creditor applies for leave to issue execution, the claim of the attorney or counsel of the executor or administrator, for professional services rendered to him, and not upon the retainer of the deceased, in the unsuccessful defence of the applicant's judgment, cannot be deducted.

FIELD v. FIELD.

An order made after the filing of papers in opposition and fully hearing counsel, is not to be deemed taken by default, within the rules as to leave to open, merely because it was finally made in the absence of the counsel, after adjournments for his convenience.

To justify opening a default, it must appear that the defaulting party has suffered loss or injury, which justice requires he should be permitted to recover or repair.

THIS was an application to open an order made by the Surrogate, on the petition of a judgment creditor.

On the 11th of April, 1876, Garrison Field presented a petition to this court, in which he stated, amongst other things, that he had obtained judgment against Nicholas Field, as executor of said Charlotte Field, deceased, for \$3,007.25, damages and costs, and also \$92.89 costs on appeal; and praying that the executor be required to show cause why an execution should not be issued. An order was thereupon made, requiring the said executor to appear on the 21st, then instant, and render an account and show cause accordingly. A citation to that effect was duly sworn on the 13th; and on the return day, the matter was adjourned, and was thereafter postponed from time to time, until the 24th day of May, following, on which day the executor filed a verified account or "statement" of the affairs of the estate, from which it appeared that he had assets of the estate in his hands, amounting to \$4,109.12, to which may be added, on suggestion and by consent, \$2,589 more, being the amount of a mortgage given by one Yerks, making in all 6,698.12; and that he had paid out the sum of \$1,383.82; that claims had been presented against the estate, to the amount of \$4,034, of which \$1,730, seemed to be for attorney and counsel fees, of which a portion was apparently incurred in the case, in which the then petitioner's judgment were obtained. Treating this last sum as composed of claims to be paid in full, there remained only an outstanding claim of one Archer unpaid

FIELD v. FIELD.

of \$2,300, and the amount of these judgments and interest.

No testimony was taken on the accounting, and there was nothing in the shape of written admissions or stipulations of the parties, other than the amount added, as above stated, to the sum of the assets.

After various adjournments, and after frequent appearances of the parties by counsel, at which no progress was made, on the 7th July, 1876, an order was entered granting leave to issue execution for the sum of \$1,975, being about sixty per cent. of the amount due. Execution was accordingly issued; and on the 18th of September, 1876, an application, representing that such execution had been returned unsatisfied, was made to the court for an attachment against the executor, which was granted, and the attachment was issued, and the executor was attached. On the return day, the usual interrogatories were filed, and the same were duly answered on the 10th October, to which day the matter had been duly adjourned, when it was determined that the answers were insufficient to purge the executor of the contempt.

Thereupon, an order was obtained by the executor, on a petition presented for that purpose, requiring the judgment creditor to show cause, on the 21st Oct., why the order directing execution to issue should not be vacated. The grounds of the application, as set forth in the petition were, in substance, that the executor was ignorant of the order directing execution to issue, until he was called upon by the sheriff with the execution; that at the time said order was made, an action (*Archer v. Field*) was pending, to recover the amount of said claim of \$2,300, reserved as aforesaid, and which action was still undetermined; that an appeal had been, on the 26th day of July, 1876, taken by the executor, from the judgment of the general term of the

FIELD v. FIELD.

Supreme Court, on which judgment this court had directed execution to issue, and it was stated, that in so appealing, the executor did not give the requisite undertaking to stay execution pending such appeal; and he alleged that he could not safely pay the amount of the execution pending said action and appeal.

This court, on the 3d Nov., declined to vacate the order permitting execution to issue.

The application was by permission, renewed on the 29th Nov., on petition and affidavits, alleging, amongst other things, that the order granting leave to issue execution "was issued by default;" that the order for the attachment was granted *ex parte*, and without knowledge by this court, that the appeal had been perfected; that the court in fixing the amount in the order for leave to issue execution, acted under a mistake of the facts; and that there was a palpable error in the amount fixed, for which execution was ordered to be issued, as appeared from the face of the account, the amount being much too large, and especially considering the action pending about the disputed claim of Archer, and the appeal. The affidavit of Mr. Millard, proctor for the executor, read on the application, tended to show that the "Yerk's mortgage" was added to the statement of the executor, so filed, without his knowledge or consent; that the appeal to the Court of Appeals and the pendency of the action of *Archer v. Field*, touching the claim of \$2,300, were matters of statement made by counsel, in presence of this court, pleading the application for leave to issue execution.

J. S. MILLARD, and C. FROST, for the executor.

CALEB GRIFFIN, for the judgment creditor.

THE SURROGATE.—The history of this case affords an illustration of the frequently loose manner in which pro-

FIELD v. FIELD.

ceedings are conducted by counsel. Often, the gravity of the questions, and interests involved, are, from the pressure of other business, overlooked, as they would not probably be in proceedings in other courts, where rules are established for the government and guidance of counsel. It is exceedingly unsatisfactory that a matter should be permitted to drift along from week to week and month to month, without much else being accomplished than to meet and adjourn by consent, or by reason of the absence of counsel. It results from such a course, that, in process of time, the court, and possibly the counsel, in a great measure, lose sight of the questions involved, and only recall them after considerable study and effort. In this very case, it is now impossible for me to conjecture why the order granting leave to issue execution was not granted on the day when the executor filed his account, or "statement." It is not, therefore, surprising that I should fail to recall occasional conversations of counsel about any of the matters involved. The higher courts have long established rules to the effect that they will disregard all agreements, or stipulations of counsel not reduced to writing, and signed. So, an admission of facts, in a proceeding, should be reduced to writing, to be of any effect, for the reason that it will not be safe to trust to the frailty of memory, especially after the lapse of a considerable period.

In this proceeding, which was commenced in April, last, and concluded in July, following, I have nothing whatever before me, except the petition and the account. Not a particle of testimony was taken, and the only admission made by the parties is embodied in the account as a charge against the executor, in my own handwriting, as follows: "Yerk's mortgage (admitted) \$2,589." Had a request been made that other admissions, if any, affecting the matter should be reduced to

FIELD C. FIELD.

writing, doubtless it would have been done. Of casual conversations between counsel, the court cannot be expected to take note. I certainly have no recollection of hearing it said that the Archer claim was then being litigated; while I have a positive recollection that there was conversation about an intention to appeal to the Court of Appeals from the judgment in question. Certainly, no request was made that any sum should be reserved for costs, in either of the cases, and the account, or "statement" of the executor, on file, does not state the existence of litigation in regard to any claim. It seems to me, however, that if both facts had been written down as admissions, there would have been no mistake or error committed, which would warrant this court in vacating the order granting leave to issue execution.

Has this court power to authorize an executor, or administrator, to retain moneys of the estate, to meet the probable expenses of a present, or prospective litigation? The only provision I have been able to find in the statute, on the subject, is as follows: "If upon the representation of an executor or administrator, or otherwise, it shall appear to the satisfaction of the Surrogate, that any *claim exists against the estate of the deceased*, which is not then due, or upon which a suit is then pending, he shall allow a sum sufficient to satisfy *such claim*, or the proportion to which it may be entitled, to be retained for the purpose of being applied to the payment of *such claim* when due, or when recovered, or of being distributed according to law." (3 R. S., 5th Ed., 183, § 74; 6 ed. p. 104, § 89; see *Hallett v. Hare*, 5 Paige, 315.)

In fixing the amount for which execution should issue, the Archer claim was taken into consideration, and the executor permitted to retain the full proper proportion thereof, besides his commissions. Can this court go farther and authorize him to retain the uncer-

FIELD v. FIELD.

tain and unascertained costs of a present or future action? To do this properly, it would be required to know, in advance, whether the tribunal in which it was, or might be pending, would award costs to be paid by the executor personally, or out of the fund. If the former, then the executor could make no charges as against the estate, even as between attorney and client, to the prejudice of creditors of the estate. (*Hosack v. Rogers*, 9 *Paige*, 461.)

The Commissioners, now engaged on a revision of the statutes, propose to amend section 74, above quoted, by requiring the decree to direct that a sum sufficient to pay an outstanding claim, or the proportion to which it is entitled, "*together with the probable amount of the interest and costs*," be retained, &c. Until some such provision shall be enacted, I do not well see how this court, being a creature of the statute, and having its power prescribed and limited by legislative enactments, can assume, as among its incidental powers, that of ordering a sum to be reserved to meet the costs and expenses of a litigation, even where the facts are properly presented to it.

I certainly can discover no mistake or error committed, as against this executor, which would justify me in reopening the matter (*Wright's accounting*, 16 *Abb. Pr. N. S.*, 446). * Possibly, without due consideration, my attention, not having been called to it by counsel, an error may have been committed, in deducting from the amount of the assets, the \$1,730 claimed by counsel, for professional services, rendered, in part, as I understand, in the very action which resulted in the judgment in question. The effect is to cause this creditor to contribute toward paying the charges of his adversary in resisting the claim, when the court had

*Compare *People ex rel Wright v. Coffin*, 7 *Hun*, 608.

FIELD v. FIELD.

awarded costs to the creditor himself. In reality, the amount of his recovery would be thereby diminished, for that purpose. This cannot be done. (*Hosack v. Rogers, supra.*) Indeed, there was no proof before me, that the bills of Calvin Frost and J. S. Millard were for legal services, but the counsel for the judgment creditor seems to have assumed them to be such, and it was not asked that they should stand upon the footing of any other unsettled claims. If they consist of charges for professional service rendered for the executor, then they are claims against him, and not "against the estate of the deceased," referred to, and provided for, in section 74.

It is urged as one reason why this application should be granted, that the order sought to be vacated, was taken by default. It can scarcely be considered a *default*, where counsel appears, files his papers, says, what he has to say, and subsequently fails to appear on the various days to which the matter was adjourned, in order to give him an opportunity to be further heard, should he desire it. I believe such was the case here, and the order was only made when it became quite evident that he regarded the case as closed, in so far as the executor was concerned. Besides, in order to the opening of a default, even, it must be made to appear that the defaulting party has suffered loss or injury in consequence, which justice requires he should be permitted to recover or repair. Here I fail to see how the executor would be benefited by reopening the matter. Quite the contrary, if the views above expressed, are correct.

The application denied with costs.

MATTER OF HOSFORD.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE—
MARCH 1877.

MATTER OF HOSFORD.

*In the matter of the application of ELIZABETH HOSFORD,
a minor, for the appointment of a guardian.*

The Surrogate has not, by the statute of this state, jurisdiction to appoint a guardian of the person and estate of a minor resident in another state of the Union, even if having property here.

The remedy is for a guardian appointed in such other state, to proceed by taking out letters here, under L. 1870, c. 59 ; 1873, c. 442.

Whether the Surrogate has such jurisdiction in case of a minor resident in a foreign country,—*query* ?

The case of *McLoskey v. Reid*, 4 Bradf. 334, limited.

The petition alleged, among other things, that the petitioner was a minor over the age of fourteen years, residing at Springfield, in the state of Massachusetts : and that she was entitled to a certain property within the county of Westchester, to wit, a legacy of one thousand dollars bequeathed to her by Azuba F. Barney late of Greenburg, in said county, deceased ; and prayed that John C. Connor Jr. Esq., of the city of New York, be appointed the guardian of her person and estate.

JOHN C. CONNOR, JR., *for the petitioner*,

cited *Redf. on Surr.* 414, and *McLoskey v. Reid*, 4 Bradf. 334.

THE SURROGATE —The power to appoint guardians for minors is conferred on surrogates by the sections 4, 5 and 6, pp. 150, 151, 2 R. S. (5th Ed. Vol. 3 pp. 243, 244.) The first of those sections provides, that where the father shall have failed to appoint such guardian, by deed or will, then a minor “of the age of fourteen years, may apply, by petition, to the Surrogate of the county

MATTER OF HOSFORD.

where the residence of such minor may be," for the appointment of such guardian. The next section provides for the application in behalf of one under fourteen years of age, "to the Surrogate of the county where such minor shall reside," for such appointment. By the 6th section, it is provided that "the Surrogate to whom application may be made, under either of the preceding sections, shall have the same power to allow and appoint guardians as is possessed by the Chancellor," (now Supreme Court.)

Prior to 1870, the above statute conferred the only power over the subject, which the Surrogate possessed. It will be observed that the residence of the minor, in the county of the Surrogate, is a jurisdictional fact. Cases, in which questions affecting the jurisdiction of these officers in this regard, are referred to in *Redf. on Surr.* 409. (*Brown v. Lynch*, 2 *Bradf.* 214, *Ex-Parte Bartlett*, 4 *Ib.* 221, *Matter of Pierce*, 12 *How. Pr.* 532.)

It is claimed, on behalf of the petitioner, that this court has power to appoint a guardian of the person or estate. This is undoubtedly true, in a case where it has jurisdiction. I had occasion to pass upon that question in the *matter of Herbeck*, (16 *Abb. Pr. N. S.* 214,) in accordance with the view urged.

But the difficulty here encountered is, as I conceive, an entire want of jurisdiction to appoint a guardian of either the person or estate. I am referred to the case of *McLoskey v. Reid*, (4 *Bradf.* 334) as an authority to show that such jurisdiction exists, in so far as the property of the minor is concerned. True, the learned Surrogate there says, that the appointment of a guardian for the person or property of an infant is an act of jurisdiction dependent upon the situation of the person or the property within the territory of the state; and, elsewhere, "I can find no reason for doubting that the *situs* of

MATTER OF HOSFORD.

assets belonging to a minor has always been considered a sufficient basis for a grant of guardianship." If it were intended simply to declare that the Chancellor, in such cases, had power to appoint a guardian, then the Surrogate was, doubtless, correct, but if he intended to claim jurisdiction himself, I must confess I cannot see whence he derived it. Judging from the points submitted by counsel in that case, the question does not seem to have been discussed, and I conclude that the above quoted *dicta* were derived from cases determined by the English courts and our Chancellors, and without reference to the fact that the Chancellor was clothed with much more comprehensive power than a surrogate, who derives his entirely from statute law. Possibly too, he may, without careful examination, have considered that the statute clothed him with all the powers "possessed by the Chancellor," and overlooked the fact that the exercise of such power was limited to the Surrogate of the county where the minor resided. In that case, the minor resided in a foreign county, and the Surrogate may have been impressed with the idea that international comity required him to entertain the views expressed. Whether right or wrong, in supposing that that fact conferred jurisdiction, is of no consequence in this case, as no such comity is recognized as between the different states of the Union. On the whole, I am inclined to believe that although not so stated by him, it was not intended by that learned jurist to claim for himself the power to appoint a guardian, but to indicate simply that the Chancellor had such authority. In the same volume, in *Ex-parte Bartlett, supra*, the same Surrogate discusses the question as to the residence of the minor being in New York or Brooklyn, in order to determine, whether he, or the Surrogate of Kings, had jurisdiction to appoint a guardian, and in *Brown v. Lynch, (supra)*,

MATTER OF TRAZNIER.

he holds that jurisdiction exists only where the minor is a resident of the county of the Surrogate.

Since the Revised Statutes, above referred to, were enacted, two statutes have been passed, which furnish a remedy in this case; one in 1870 (chap. 59, of the session laws) to enable non-resident guardians to obtain property in this state, belonging to their wards residing in other states or territories of the United States, and another in 1875 (chap. 442), amendatory thereof. If the petitioner has a guardian in the State of Massachusetts, she may obtain the fund in question by complying with the requirements of this law, and, if she has not, she can procure the appointment of one, who can then, in like manner, be enabled to obtain its possession.

The application is denied.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—
APRIL, 1877.

MATTER OF TRAZNIER.

*Matter of accounting of T. G. SWARTWOUT, Guardian of
MARTHA E. TRAZNIER, a minor.*

A conservator or committee of a lunatic minor, appointed in another state, is not entitled in the Surrogates' courts, to call a guardian of the minor in this state, to account for, and pay over to him, the Estate of the minor in his hands. The remedy is by application to the Supreme Court.

SINCE the guardian of the minor was appointed, she has become a resident of the state of Connecticut. She is now of age. Shortly before, or since, she attained her majority, she became a lunatic, and was so pronounced by the proper authorities of the sister state, and a conservator, tantamount to a committee under our statutes, was appointed. This conservator filed in the office of the

MATTER OF TRAZNIEB.

Surrogate evidence of his appointment, and then petitioned for a citation requiring the guardian to appear and account, and pay over to the petitioner the moneys in his hands. On appearing, the guardian admitted that he had in his hands as such, the sum of \$500, together with interest thereon, from August 8, 1875, less \$1.50 to be deducted therefrom. He objected, however, that this court has no authority to compel him to pay the money, and that the applicant is not in a position to enforce its payment.

DANIEL HAIGHT, *for petitioner.*

T. G. SWARTWOUT, *in person.*

THE SURROGATE.—It has been repeatedly decided in this state, that letters testamentary, or of administration granted abroad, will not be entitled to notice in our courts. By the laws of some states and countries, where the decedent has made a will, and has named an executor to administer the estate, such executor becomes entitled to the possession of the whole of the personal estate, wherever situated. Such was the law of this state previous to our Revised Statutes. But, in cases of intestacy, the right of the administrator, except where he is entitled to the succession, must, in equity as well as in law, depend upon his grant of a power to administer by the proper tribunal. And even where the grant has been made by the tribunal of the state or country where the decedent was domiciled at the time of his death, the grant cannot extend, as a matter of right beyond the territory of the government making the grant. Hence, if the letters were granted in another state, the administrator cannot maintain an action here to recover assets of a decedent, unless he first take out ancillary letters here. (*Robinson v. Crandall*, 9 Wend. 425, *Smith v. Webb*. 1 Barb. R. 230, *Vroom v. Van Horne*.

MATTER OF TRAZNIER.

- 10 *Paige*, 549.) The doctrine prevails in reference to a minor domiciled and having a guardian in another state, who has property here; and I see no reason why it should not be equally applicable, in so far as the removal of the property is concerned, to the case of a lunatic non-resident.

It seems to be the policy of our laws to protect and preserve the property that may be within the jurisdiction of the state, and not to permit its removal by the action of its courts, without due circumspection and certain legal safe-guards. A conservator or committee of a lunatic, appointed in another state, has no more power in this regard, than an executor, administrator or guardian thus appointed. It would seem that a foreign executor, or administrator, and perhaps a committee of a lunatic, may in ordinary cases, receive money or property belonging to the estate he represents, which is situated in this state, if the same be voluntarily surrendered to him, (*Brown v. Brown*, 1 *Barb. Ch.*, 189), but he cannot recover the same, by action in our courts. It may, however, be doubted whether the guardian in this case, having been appointed by this court, could be justified in making such voluntary payment. In the *Matter of Taylor*, (9 *Paige*, 610) the lunatic had a committee, or conservator of his person and estate, in the state of Connecticut, where he resided, and, having property here, an application was made to the Chancellor, to appoint a committee of his estate, which was located here. The question as to the propriety of the application, and the power of the Chancellor in the premises, was not even questioned, or discussed, and the committee was appointed.

I am satisfied that this court has no power to direct the guardian to pay the fund in his hands to the conservator thus appointed abroad, and that the only mode

HITCHCOCK v. MARSHALL.

by which the fund can be reached and applied to the support of the lunatic, is by an application to the Supreme Court, which has power to appoint a committee of the estate here, and to direct and control such committee, as to the mode of its disposition.

The application is therefore denied.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—
MAY, 1877.

HITCHCOCK v. MARSHALL.

In the matter of the final accounting of STEPHEN S. MARSHALL, administrator, &c., of JOHN HITCHCOCK, deceased, intestate.

Under the provisions of the *Revised Statutes* (2 R. S., 95, §71) directing that "upon the rendition and final settlement of the account of an executor or administrator, when it appears that any part of the estate remains to be paid or distributed, the Surrogate shall make a decree for the distribution thereof, among the * * * next of kin to the deceased * * * and in such decree shall settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive share; to whom the same shall be payable; and the sum to be paid to each person," the Surrogate has no jurisdiction to determine the rights of two persons, each claiming a right to be paid as distributee by virtue of an assignment or other transfer.

Nor can the Surrogate exercise this power even upon the request of both the claimants.

The Surrogate cannot order payment of a distributive share to be made to an assignee thereof, even when there is no objection thereto.

STEPHEN S. Marshall, the administrator of John Hitchcock, a deceased intestate, filed, on May 23d, 1873, his petition for a final settlement of his account, and a citation was duly issued and served accordingly, and on September 24th, 1873, his accounts were filed, by which it appeared that the distributive share of George Walker, one of the children of the deceased, amounted to \$-71

HITCHCOCK v. MARSHALL.

47. A decree was accordingly proposed by the proctor for the administrator, by which the administrator was to pay the said sum of \$671.47 to the said George Hitchcock, and also provided that he should pay the share of John Hitchcock, jr. to one Purdy, who claimed the same under a judgment against the said John Hitchcock, jr. obtained by the administrator and assigned to him.

This decree was not submitted to the Surrogate, and was not signed or entered by him, and the share of George Hitchcock was not paid to him by the administrator. On May 3d, 1877, one William Hitchcock applied to the Surrogate for an order directing the administrator to pay to him the share of George Hitchcock, claiming that he had received an assignment of it. In opposition to the motion, appeared the administrator, and also Frederick A. Hitchcock, who claimed that he was entitled to the share of George Hitchcock by proceedings under a judgment against him.

The said George Hitchcock also appeared, but made no claim to the share.

The administrator objected to paying the share to any one until the question of who was entitled thereto was determined. The claimant of the share thereupon applied to the Surrogate to take evidence and decide that question, and that the administrator be ordered to pay the money into the Surrogate's office, or deposit it in a trust company, to abide the event of that proceeding. The administrator objected to the proposed order.

G. G. MARSHALL, *in person*.

H. G. ATWATER, *for* WM. HITCHCOCK.

E. RITZEMA DEGROVE, *for* F. R. HITCHCOCK.

THE SURROGATE.—I think this court has no power to adjudicate the question as to which of the claimants, if either, is entitled to the distributive share of George

HITCHCOCK v. MARSHALL.

Hitchcock. I am further of opinion that it cannot properly recognise an assignee of a distributive share, legacy, or other interest in an estate, even where no question arises as to the validity of the assignment.

By section 57, 3 R. S. 178 (5th Ed.), it is provided that an executor or administrator may be required to account, by an order to be granted by the Surrogate, upon application from some person having a demand against the personal estate of the deceased, either "*as creditor, legatee or next of kin.*" An assignee of either is not *the* creditor, legatee, or next of kin, and hence the executor or administrator could not be required, by the Surrogate, to render an account on his application.

Section 66 provides that in a case where an executor or administrator has been cited to render an account, under section 57, he may apply for a citation, which the Surrogate shall issue, requiring "the creditors and next of kin of the deceased, and the legatees, if there be any," to appear and attend the settlement of his account. There is no provision here for citing the assignee of the persons mentioned.

It is also provided by section 69, that any creditor, legatee or other persons interested "*as next of kin or otherwise,*" may attend and contest the account, &c. The word "*otherwise*" means simply the class of persons referred to in section 57.

Section 78 directs the Surrogate to make a decree for the distribution among the creditors, legatees, widow and next of kin to the deceased according to their respective rights; and in such decree, he shall settle and determine all questions concerning any debt, claim, legacy, bequest or distributive share, to whom the same shall be payable and the sum to be paid to each person.

Section 82 provides for the distribution of the sur-

HITCHCOCK v. MARSHALL.

plus remaining after the payment of debts, &c., "to the widow, children or next of kin," in the manner indicated in a number of sub-divisions.

It will thus be seen that the general object of the chapter containing these sections is to insure the speedy administration of the estates of deceased persons, adequate facility for the enforcement of the rights of claimants, and suitable protection to executors and administrators against claimants of the estates of which they are representatives. It is these two classes of interest, the executors and administrators on the one hand, and creditors, legatees and next of kin on the other, with which the chapter is particularly concerned, and with reference to them its provisions are, in the main, to be expounded. The rights of claimants, *inter sese*, except in so far as the determination of those rights is necessary to the fixing of the rights of the two classes specified, are not within the general purview of the chapter, and contests between creditors, so far as they arise and are necessary to be disposed of in order that this protection may be given to the executor or administrator, must be disposed of, and such distribution will be conclusive upon the parties to them. (*Bank of Poughkeepsie v. Hasbrouck*, 2 *Seld.* 216.) For instance, in a case where the assets are insufficient to pay all of the debts against the estate, one creditor may dispute and cause to be reduced, or wholly rejected, the claim of another creditor in order that his *pro rata* share may be increased: and again, if there is a dispute as to the person of the legatee, or as to the persons who are entitled as distributees, whether widow or next of kin, or as to the amount due to each, the duty of the Surrogate is to determine the controversy, and to decide who are the proper persons to whom the legacy or distributive shares must be paid, and the sum to be paid to each,

HITCHCOCK v. MARSHALL.

under section 78. It is to controversies of this character, only, that the provisions of that section relate. If a Surrogate had power, under this section, to decree payment to an assignee, then clearly, he could determine the question as to which of two contending parties was the real assignee; but this he cannot do, as appears by the *note* to the case hereafter cited.

The proposed New Revision of the Statutes, by § 2,743, provides for a distribution "to the creditors, legatees, next of kin, husband or wife of the decedent, or *their assigns*." This language, if incorporated in above section 78, would enable the Surrogate, not only to direct payment to any of the persons named, but also to try any and all questions that might arise among them, affecting the distribution.

It is uttering a platitude to say that Surrogates' Courts are creatures of the statute, and can exercise no powers not conferred by its provisions, or by reasonable implication. I can find nothing in the enactments, on the subject, nor anything that may justly be inferred therefrom, authorizing me to take cognizance of the controversy in this matter. In all the cases enumerated by the statutes, the Surrogate must exercise his powers in the cases and *in the manner* prescribed by those statutes, (§ 1. 3 *R. S.* 362, 5th *Ed.*), and if he departs therefrom, and exercises powers for which he has no authority, or exercises them in a manner different from that prescribed by those statutes, his acts are void, (*Redf. Surrogate's Practice* 11, and cases cited.) If, therefore, he has no power to hear and determine a controversy between rival claimants as assignees of a distributive share, he could not enforce a decree, wherein he assumed authority to direct payment to be made to one of them, by attachment. It seems to me equally clear that he could not enforce payment to an assignee, where there is no controversy.

BAKER'S WILL.

Here the rival claimants may each allege that the other's assignment was procured by fraud, and in such a case a trial by jury might be desired by one or the other, or both. For the enjoyment of such right this court has no power to provide. (See *note* to case of *Carpenter v. Keating*, 10 *Abb. Pr. N. S.* 223.)

It was, indeed, proposed by counsel that this court should appoint a referee to determine the controversy. The Surrogate of New York is the only officer of this kind with whom such a power is lodged, and he can only exercise it in a proper case.

It is needless for me to indicate what course should be pursued by the rival claimants. That they are not without remedy seems to me clear. It must suffice to say that I am decidedly of opinion that this court has no power to hear or determine the matter.

The decree prepared in 1873, modified so as to meet these views, and which directs the payment of George's share to him, must therefore be entered *nunc pro tunc*.

Decree accordingly.

NEW YORK COUNTY.—HON. ROBERT C. HUTCHINGS, SURROGATE.—
DECEMBER, 1876.

BAKER'S WILL.

*In the matter of the probate of the Will of SUSAN A. BAKER,
deceased.*

When a divorce, granted by a court of another state, is set up in the Surrogate's court here, as rendering legal a subsequent marriage on the validity of which the claim of a party depends, the divorce may be impeached by evidence that it was obtained by fraud and perjury. Undue influence, vitiating a testamentary provision, may be proved by circumstantial evidence.

From a husband's application for probate of his wife's will, containing a bequest of a life estate to him, it appeared that he had been formerly

 BAKER'S WILL.

married to another woman, against whom he had procured a divorce, by fraud and perjury, and that by fraudulently representing that he was thereby made free to marry again, he had induced the decedent to marry him, secretly, and that while she was his wife she had made the bequest in his favor, now in question. *Held*, that these circumstances were sufficient evidence of undue influence to avoid the bequest.

It seems, that the burden of proof as to undue influence in the case of parties standing in a relation of trust and confidence, is upon the beneficiary.*

The Surrogate of the city and county of New York may reject a separable part of a will for undue influence, while admitting the residue of the instrument to probate.

THIS was a proceeding for the probate of a paper propounded as the last will and testament of Susan A. Baker, deceased.

The will was propounded by the executor, by a petition praying that the will might be proved, and letters issue thereon, excepting one bequest or "item" which it prayed might be rejected.

The decedent was an educated lady of high social position, of about thirty years of age, and who, until the time she left the city of New York, in the spring of 1873, with the legatee, John A. Baker, to whom she had been married a few months before, had resided in the family of her mother.

The paper which is offered for probate as the last will and testament of the decedent, contains the following

* The most recent English authorities recognize a distinction in this respect, between wills, and transactions *inter vivos*. In the latter class of cases, they apply the rule stated above; in the case of wills, it is held that the mere existence of the special relation does not throw upon the beneficiary the burden of proving fairness, &c. : but the existence of the relation coupled with circumstances of secrecy and suggestion may *do so*; and doubtless the case in the text, where the relation itself was induced by fraud, is consistent with those decisions. Compare on this subject, and see 8 *Harris*, 329; *Parfitt v. Lawless*, *L. R.*, 2 *P. & D.*, 462, 468; *S. C. Moak's Eng.*, 693; *Ashwell v. Lomi, Id.*, 483, 705 : *Dean v. Nagley*, 41 *Pa. St.* 312; *Monroe v. Barclay*, 17 *Ohio St.* 302; *Wilkinson v. Joughlin*, *L. R.* 2 *Eq.*, 319; *Carron v. Hunter*, *L. R.*, 1 *H. of L.* 362; *Fulton v. Andrew*, *L. R.* 7 *H. of L.* 448.

BAKER'S WILL.

provision, which was the subject of contest in the proceeding before the Surrogate:

"I give and bequeath, and I hereby direct my said trustees, or the survivor or survivors of them, to pay annually to my husband, John A. Baker, me surviving, the sum of fifteen hundred dollars during his said life, or until he shall succeed, by operation of law, to any portion of my estate as heir to the issue of my body, and I hereby make this legacy a charge upon my said estate."

EVERETT P. WHEELER, (McDANIEL, LUMIS and SOUTHER, *proctors*)
for the legatee.

STEPHEN P. NASH, CHARLES N. BLACK, (GEORGE M. RAY, *proctor*)
for the executors, contestants.

THE SURROGATE.—The decedent died in child-birth, in Charleston, S. C., in the year 1874, leaving no issue; so that only the annuity of fifteen hundred dollars for life, could in any event go to the legatee named.

The validity of the clause cited above was contested on the ground of fraud and undue influence exercised over the decedent by the legatee, John A. Baker. It was not contended that she was of unsound mind; or that she did not intend to make the bequest to Baker as her husband; or that a marriage ceremony had not been duly performed by competent authority; but it was claimed by the contestants—the next kin of the decedent—that Baker was not, at the date of the marriage ceremony, competent to marry, by reason of having a wife then living, from whom he had never been legally divorced; that by specious but fraudulent representations he induced the decedent to believe that a decree of divorce which he had obtained in the State of Minnesota, from a former wife, was a valid decree, and under this belief, consent to a marriage without the knowledge of the decedent's family; and either as the result of direct persuasion or indirect influence, and certainly under the

BAKER'S WILL.

belief that Baker was laboring under no legal disability to prevent him from entering into a marriage with her, at the time the ceremony was performed, and that he, thereafter, was her lawful husband, she made the bequest named—when she would neither have consented to the marriage, nor made him the recipient of her bounty, had she been aware of the real facts connected with his previous marriage and alleged divorce.

To consider intelligently, the question at issue, it is necessary to examine the case with reference to the facts as shown by the evidence.

The legatee, John A. Baker, is a native of North Carolina, and at the death of the decedent was about forty-three years of age. He was educated a lawyer. He was married many years since, to a lady who subsequently died, and who left as the fruit of their marriage, a daughter. In 1867, while a widower, on his way to Europe, he met a Miss Letitia Hargin, a resident of Chicago, whose acquaintance he then formed. Each returned to America during the season, at different times, and in the fall of the same year Baker called upon Miss Hargin, who was residing with her mother in Chicago, renewed his acquaintance, and paid attentions to her with a view to marriage. He subsequently left that city, returned about Christmas, and further pressed his suit. About this time, Miss Hargin informed him of a previous marriage to one Horton, from whom she had been divorced, and furnished him with information to obtain the full facts of the case, if he desired, or, if the fact of her being a divorced woman was felt by him to be an objection to pursuing his attentions further, he might withdraw his suit. In March, 1868, he wrote her a letter replete with assurances of love and affection, and asking her to accept him in marriage. An engagement followed, and, in November of 1868, Baker and Miss Hargin were

BAKER'S WILL.

formally married in Chicago, and thenceforward, for nearly a year, they lived together, except during his temporary absences; and the evidence seems to show as a fact, that, in the meantime, he was wholly supported by his wife's mother, a lady in prosperous business, and who advanced him considerable pecuniary assistance. But, late in October, of 1869, he abandoned his wife, writing her a letter from Indiana, in which he charged her with gross offences. Twenty-two months after—on the 25th day of August, 1871—he commenced an action for divorce against her in the Fourth Judicial District of Minnesota, in which state he had acquired a domicile. In the complaint, which was neither signed nor verified by Baker, but was signed by his attorneys, it was charged that his wife had practiced fraud and deceit upon him, at the time of their marriage, by concealing from him the fact of her previous marriage to her first husband, Horton (who it was alleged in the complaint had deserted her), and on the discovery of which fraud on her part, he, Baker, had abandoned her; and the complaint further charged her with adultery with certain parties named.

On the same day, Baker made affidavit that the defendant, Letitia Baker, was a non-resident of the state of Minnesota, and that he did not know her then place of residence. Upon this affidavit, the Court granted an order permitting the service of summons by advertisement. The summons was thereupon published in a paper called the *Minnesota Temperance Advocate*. Upon affidavit of Baker's attorney, on the 20th of December, 1871, that no notice of appearance, and no answer had been served on behalf of the defendant, the Court, on motion, ordered that the cause be heard before a Referee, to take and report the evidence and his findings thereon. The cause was tried be-

BAKER'S WILL.

fore the Referee on the 2d day of January, 1872, when two witnesses were produced, who, according to the record of proceedings in the case, testified in a most brief, vague and general way, to the facts alleged in the complaint; and, in addition, that the defendant was a woman of disreputable character. The finding of the Referee was in accordance with the proofs; and upon it, on the 6th of January, 1872, the Court granted a decree of divorce.

Within a few weeks, at farthest, from the date of the decree—either in January or February, 1872—Baker came to the city of New York, with a letter of introduction from a member of the family of an aunt, Mrs. Brown, resident of Minneapolis (and with whom he had resided when in Minnesota), to the family of Mrs. Lawrence in this city, where he for the first time met her daughter, the decedent, then Miss Susan A. Lawrence, and whose acquaintance he formed. His advent, it appears, was followed in a short time by an offer of marriage to the decedent. It is evident that he pressed his suit strongly, as he followed the family to Lennox, Massachusetts, where they passed the summer, and in the meantime the two had become engaged. But, certain statements derogatory to the character of Baker having come to the knowledge of the decedent's family, and further inquiry bringing to light the fact of his recent divorce, their influence was sufficient to break the engagement, and in September of the same year, Baker returned to Minneapolis, whence, through the medium of Miss Eliza Brown, his cousin, who had come from Minneapolis to New York, for a protracted visit, he opened a correspondence with the decedent, renewed his suit, and sought to reinstate himself in her favor. To convince her of the legality of his divorce from his previous wife, Letitia, and that he was under no legal disability to prevent

BAKER'S WILL

him from again marrying, he procured the opinion of legal counsel in Minnesota, that the proceedings under which he had obtained a divorce from his wife were regular, under the practice in that State, and that under the Statutes the decree could not be opened. This opinion and a copy of the judgment roll was, through the instrumentality of Miss Brown, submitted in November, 1872, by the decedent, to eminent counsel in this city, who expressed a guarded opinion, on the assumption of the correctness of the facts stated, in the opinion of the Minnesota counsel, that the divorce granted was legal, and that the matters at issue having been passed upon by a court of competent jurisdiction, the judgment record would be regarded as conclusive in this State. The decedent seems, through the means resorted to, to have been convinced that no legal impediment existed to Baker's marrying; for three days after the date of the opinion of the New York counsel, on the 14th of November, she was secretly married to him at the residence of the clergyman who performed the ceremony, in the presence of Miss Brown, the cousin, and a male friend of Baker, as witnesses; the arrangements for the marriage having been previously made by Baker, with the clergyman, who, having been accidentally informed of Baker's recent divorce, and the doubts in regard to its validity, was also shown the opinion of counsel in the matter, by which he was satisfied of the right of the parties to marry. Baker, soon after, returned to Minneapolis, and the decedent remained with her mother in this city, but keeping her family in entire ignorance of the fact of her marriage. During the winter, Baker kept up constant correspondence with the decedent, through the medium of his cousin, Miss Brown, with whom the decedent was in frequent communication.

On the 5th day of March, 1873, as already stated, the

BAKER'S WILL.

decedent secretly executed her will, at the residence of a lady acquaintance on Fifth Avenue, and on the first or second day following—the 6th or 7th of March—she met Baker in front of a dry goods store, on the corner of Sixth Avenue and Fourteenth street, where the two entered a carriage and left the city for Charleston, South Carolina, where the decedent resided with Baker as his wife, until her death, in 1874.

The validity of the paper offered for probate depends upon the question, whether an undue influence was exerted by Baker, the beneficiary of the life annuity provided, over the mind of the decedent, to prevent such an exercise of testamentary power as is necessary to sustain an instrument offered as a will.

No testimony has been presented on behalf of the contestants, to show that Baker exercised any direct personal influence in the preparation and execution of the instrument. On the contrary, so far as appears, the decedent, when alone, gave to the lawyer who drew the paper, her instructions—the gentleman being a reputable member of the bar, whose employment had been suggested by an acquaintance to whom she had confided a knowledge of her marriage, and of her desire to make a will. It is also shown that the execution was delayed for two or three days after its preparation. Baker was not present at the time of the execution, nor is there any proof that he was then in the city, though either the next or the day thereafter, he met her, evidently by appointment, when the two left for Charleston.

It will be seen therefore, that the evidence of undue influence relied upon by the contestants is, of necessity, of an indirect and circumstantial character, but which, it is claimed, is sufficiently strong to justify me in holding that such influence was exerted by the legatee. In other words, the contestants claim that Baker was guilty of

BAKER'S WILL.

fraud and deceit in imposing himself upon the decedent as a man who had the right to marry, when, in point of fact, he had a wife from whom he was not legally divorced ; that, by resort to specious devices, he convinced her that he was the object of an unjust and unfounded suspicion and prejudice, in the minds of the members of her family ; that she, thereupon, consented to a marriage, and thenceforward lived under the delusive belief that no cloud rested upon their marital relation, and that under such delusive belief, if not by direct importunity on his part, she directed the preparation of, and formally executed the instrument containing the bequest in his favor ; whereas, without such false and fraudulent representations on his part, no such delusive belief would have existed and been fostered, and no such marriage would have been contracted, and, without such marriage, no such paper would have been executed.

This case, therefore, presents a novel and rather extreme view of the law applicable to the question of undue influence ; and in determining the matter at issue, it is proper to examine the salient features of the legal proceedings in the action instituted by Baker, in Minnesota, for a divorce from his wife, Letitia, in the light of the facts that have been developed on the hearing before me.

Upon the evidence produced, I am convinced that the divorce proceedings commenced by Baker were conceived in fraud. The following facts are shown :

1. He had secretly abandoned his wife, Letitia, a woman holding a reputable position in society, whose hand he had eagerly sought in marriage, and abandoned her under circumstances most discreditable to himself, and at which time he added insult to injury by accusing her of gross offences.

2. Taking advantage of a brief residence in another

BAKER'S WILL.

State, if the domicile was not acquired for the express purpose (and in view of all the facts this is fairly inferable), he commenced an action for divorce against his wife, accusing her of both bigamy and adultery—allegations which are shown to have been utterly false, and, so far as the charge of adultery is concerned, Baker himself admits that he had no personal knowledge of the facts alleged.

3. The proceedings were commenced and conducted with special reference to preventing any notice thereof coming to the knowledge of his wife, and yet to comply with the requirements of the statute. The service of summons was by publication, when Baker knew where his wife had lived for many years. The publication, too, was in an obscure weekly paper, the name of which imports that it was read by only a special class of readers, and was not patronized by the general public.

4. The proofs given on the hearing before the referee, as recorded, if given at all, were procured by subornation. One of Baker's witnesses in the divorce suit, who has been produced before me in this proceeding, states that the hearing was had in Baker's law office, by lamp-light; that no oath was administered to him, or to the other witness; that he was questioned by a lawyer in reference to a woman whom he had known in Chicago, and he stated that Letitia, the wife of Baker, who has been present in the hearings before me, and whom he saw here for the first time, was not the person to whom he had reference. If the statement of this witness before me be true, it shows conclusively the foisting of a fraudulent record upon the Court in Minnesota.

He admitted that if he had testified wilfully to the facts as they appear upon the record of the Minnesota Court, he was subject to criminal prosecution. Neither the fraud nor the perjury, if perjury there be, could have existed without the knowledge of Baker.

BAKER'S WILL

I am convinced that Baker resorted to this fraudulent scheme with a full knowledge that the allegations he had caused to be made against his wife were false, and that the case was to be carried through under the forms of law, either by a false and fraudulent record or by fabricated testimony, or by both. Certain it is that his wife Letitia, whom he had secretly abandoned and afterwards defamed, as shown by the proofs before me (she herself appearing as a witness), never knew that any action for divorce had been instituted against her; and it was not until she was found with reference to making her a witness in this proceeding, that she learned that her husband had been divorced from her, and that for over two years her condemnation as an adulteress and a lewd woman had existed on the records of a court of justice. In my judgment, upon a proper proceeding commenced by his wife Letitia, the Court in Minnesota, upon the presentation of the facts, would at once vacate the decree; and certainly the courts of this State, in a proceeding where her rights in the property of her husband within their jurisdiction were involved, would disregard the decree when the facts under which it was obtained were made known to them.

But it is contended on behalf of Baker, that if the judgment of divorce obtained by him against his wife, Letitia, is to be regarded as void, the same rule must apply to the judgment obtained by Letitia, against her first husband, Horton, because the action in that case was commenced by publication—Horton being a non-resident of the State of Illinois—and the defendant having put in no appearance or answer, and the proofs having been taken before a Master, upon whose finding the decree of the Court granting the divorce was entered. Hence, it is argued, if that proceeding and decree were void, Baker was never legally married

BAKER'S WILL.

to Letitia, and he was, therefore, under no legal disability when he married the decedent.

But the suggestion is not apposite. The proceedings and decree in the case of Baker *vs.* Baker in Minnesota are not claimed to be, nor are they void, because the action was commenced by the service of summons by publication, and because no steps, which might have been, were taken to give the defendant actual notice of the proceeding commenced against her. If void, it is because of fraud or irregularity, or both.

And the proofs before me leave no doubt in my mind that the decree of divorce obtained by Baker was obtained by him in fraud of the law, and in fraud of the rights of his wife Letitia. It is not pretended that the proceedings for divorce in the action commenced by Letitia in Chicago against her first husband, Horton, were obtained by fraud, or supported by perjury. Hence, the only similarity between the case of Baker against his wife Letitia, and the case of Letitia against her former husband, Horton, is in the fact that both were commenced by service of summons by publication, and that both were heard before an officer of the court, upon whose findings the decree was rendered. The proof clearly shows that Baker was cognizant of Letitia's previous divorce, and that he married her in the full belief of its legality. He was a lawyer, and knew where to ascertain the real facts in the case, and he could, if he did not, have intelligently investigated the validity of the proceeding, and the decree which followed it. It is to be presumed that he was convinced that there was no legal disability to prevent Letitia from again marrying; and certainly he acted upon such presumption. The suggestion that she had no legal right to marry, it is apparent, was an after-thought, in the effort to find a plausible ground upon which to rid himself of a relation

BAKER'S WILL.

in which his cupidity had not been gratified as he had hoped; and still later, in this proceeding, it was an after-thought sought to be availed of to remove doubts of the validity of his marriage with the decedent, in order to establish his right to take a bequest under her will. With a singular inconsistency, he claims the invalidity of his former marriage to a woman divorced from a previous husband, in a proceeding in which there is no pretense of fraud, and yet sets up the validity of his own marriage to the decedent, when his own divorce is shown to have been procured by fraud, if not by perjury. In that is the essential difference between the two proceedings for divorce. And although, in a collateral matter, the legality of his divorce from Letitia, fraudulent as it is, may not be inquired into, yet, when, that record is used as the means to enable him to contract another marriage, under circumstances of fraud and deceit, and to sustain a bequest in his favor resulting from that marriage, I am impelled to disregard it not as establishing any right that comes within my jurisdiction. (*Dobson v. Pearce*, 12 N. Y., 156.)

But, in my view, it is not essential, in the determination of this case, to decide whether the decree of divorce obtained by Baker, in Minnesota, is void, or is only voidable. It is apparent that he succeeded in convincing the decedent that it was neither, but that it was valid.

So long as the decedent supposed that Baker's right to marry was beclouded, she withheld her consent. While her mind was secretly being plied with statements to satisfy her that he was of right freed from his wife, and was at liberty to re-marry, and that the opposition of her family was the result of prejudice, they, having no suspicion of the clandestine correspondence, nor of the means to which he was resorting, to accom-

BAKER'S WILL.

plish his purpose, ignored his existence in her presence that her feelings might not be hurt by recalling memories of an attachment which they supposed was never to be revived. While Baker sedulously pressed upon the decedent evidence to convince her of the validity of his divorce, it is apparent that he studiously concealed from her the base means he had resorted to, to obtain it—the concealment and fraud, and the attempt to blast the reputation of an intelligent and reputable woman in good social standing. His own testimony does not present his conduct in any more favorable light. Many of the essential facts proven by other witnesses in reference to his divorce suit, tending to show that it was conceived and carried through by fraud, are corroborated by facts and circumstances sworn to by him; and where he directly contradicts them, the preponderance of testimony direct and circumstantial, is so strong as to utterly discredit his statements. It is a noteworthy fact that Baker has been conspicuously absent at every hearing in the proceeding before me, though it is shown that he has, during the time, been in the city. With such charges against his honor and integrity, to say nothing of the pecuniary interest he has in the issue of the proceeding, one would suppose that he would have eagerly sought an opportunity to appear personally on the stand, to vindicate himself from the aspersions which had been cast upon him; but he chose instead to be examined under a commission—a means seldom resorted to to obtain evidence when the personal presence of a disinterested witness even can be had without too great inconvenience. It is fair to infer that Baker feared that his examination in open court would establish beyond all doubt the undue influence which it is claimed he exercised over the decedent, and which created and fostered the delusion in her mind that he was rightfully her husband, and

BAKER'S WILL.

under which delusion she made him a beneficiary under her will.

But the evidence of undue influence in this case is, in my view, adequate to the result attained. Those who have selfish ends to accomplish, through influence exerted upon the mind of another, and which, if known, would result in efforts to countervail them, do not expose to the public the means they use to gain the needful ascendancy. To do so, would defeat their ulterior purpose. Nor is the mind to be operated upon apprised of the object to be gained. The undue influence exercised may be unseen and unappreciated, except by the chief actor and his agents, and be not suspected by others before the result is obtained. Hence, such influence is nearly always shown by circumstantial evidence, and seldom by direct proof. On this point, the language of Judge PORTER, in the case of *Tyler v. Gardiner*, (35 N. Y., 559), is very appropriate :

"It is not to be supposed that fraud and undue influence are ordinarily susceptible of direct proof. * * * The purposes to be served are such as court privacy rather than publicity. In some cases, as this Court said, in the case of *Sears v. Shafer*, 'undue influence will be inferred from the nature of the transaction alone; in others from the nature of the transaction and the exercise of occasional or habitual influences. The grounds for imputing it, as Sir John Nicholl said in the case of *Marsh v. Tyrrell*, must be looked for in the conduct of the parties and in the documents, rather than in the oral evidence. The necessary inferences to be drawn from that conduct will afford a solid and safe basis for the judgment of the Court. Where the oral evidence harmonizes with those inferences, a moral conviction rightfully follows; but the depositions, where they are at variance with the conduct of the parties, and with the *res gestæ*, are less to be relied upon.'"

BAKER'S WILL

Viewed in the light of the principle just stated, what is presented in this case? The decedent, Susan A. Lawrence, yielded to professions of love made by John A. Baker, an experienced and polished man of the world, and under the influence of the passion which his words and presence inspired, consented to an engagement. But, with proper regard to the proprieties of life, and her own convictions of right, she broke the engagement when doubts were suggested as to his right to enter into a matrimonial alliance. Yet she believed in his honor and on the integrity of his past acts and conduct, and was only too ready to give credence to every statement, and to magnify the importance of every fact which tended to dispel the doubts which had been raised as to his status as a marriageable man; and, blinded by love, she was equally ready to belittle the value of any statement or circumstance which militated against him as a man of truth and honor. Taking advantage of her weakness he played upon her emotions through a clandestine correspondence, while her friends, who appreciated his true character, in deference to her feelings, never alluded to him in her presence. Baker's kinswoman, Eliza Brown, through whom he had become acquainted with the decedent's family, was in frequent communication with her, and was the convenient medium through which she received his letters. She was his agent to convey to her the legal opinion of Minnesota counsel that Baker's divorce from his wife Letitia was valid. She was his agent to visit counsel in New York to get a further opinion to the same effect; and who subsequently, introduced the decedent to that counsel. She was a witness of the marriage ceremony performed in secret, under which Baker claimed the decedent as his wife, and further, she was a witness to the paper executed as a will under which Baker claims as a legatee. All these acts on the

BAKER'S WILL.

part of Eliza Brown are proven, and with her secret but active agency in behalf of her kinsman Baker, even when she was on visiting terms with the Lawrence family, it is not to be supposed that she did not sound his praises in the willing ears of the woman to marry whom was the immediate object of his scheme. But for the intervention of Miss Brown, it is improbable that the marriage would have been effected, or the paper propounded as a will would have been prepared or executed. And it is a pertinent fact for consideration also, that Miss Brown as well as Baker, was not produced as a witness on the stand, but her examination was taken under a commission, by which she could not be compelled to disclose all the facts within her knowledge connected with her communication and intercourse with Baker and the decedent. The relations of Miss Brown to Baker, as shown by the testimony, were such as to justify the belief that all her acts or influence over the mind of the decedent in obtaining the marriage, and subsequently the execution of the will were as the agent of Baker, and that if they constitute undue influence on her part, they must revert to Baker as the principal.

But while I hold that the contestants have, in view of all the facts and circumstances, established an affirmative case of undue influence, I am further of the opinion that, were the proofs less convincing, considering the relations of the parties, the law would hold that the contestants have made out a case to justify me in declaring the bequest to Baker void, through undue influence. It is a principle of law well settled, that, where there is between the parties a relation of confidence which gives one dominion or influence over the other, gifts or bounties from the weaker to the stronger party, in derogation of the rights of others who are the natural recipients of such gifts or bounties, will not be sustained

BAKER'S WILL

by a court, without affirmative evidence on the part of the recipient that they were made without improper suggestion (1 *Story Eq. Jur.*, §§ 307, 323). In other words, the burden of proof is upon the recipient of the gift, whose relation imports dominion over the giver, to show that no undue influence was exerted. In England this principle has been extended beyond those relations under which the questions have usually arisen—the relations of attorney and client, guardian and ward, physician and patient, and trustee and *cestui que trust*—to cover all the various relations of life in which dominion may be exercised by one person over another. (*Dent v. Bennett*, 4 *Mylne and Craig*, 209; *Lyon v. Home*, *L.R.*, 6 *Eq.*, 653; *Page v. Horne*, 9 *Beavan*, 570; *Coulson v. Allison*, 2 *Giffard*, 279, and 2 *De Gex, Fisher & Jones*, 521.) In the case of *Page v. Horne*, Lord Langdale, the Master of the Rolls, says: "It is true that no influence is proven to have been used, but no one can say what may be the extent of the influence of a man over a woman whose consent to marriage he has obtained. * * * The Court will not only consider the influence which the intended husband either by soothing or violence, may have used, but require satisfactory evidence that it has not been used."

In the present case, we have evidence which shows conclusively, to my mind, that the legatee, John A. Baker, had sufficient influence to induce a refined and sensitive woman, to whom a violation of the conventional proprieties of life was evidently repugnant, to consent to a marriage in opposition to the wishes of her family, who believed him unworthy of her, and to a marriage in secret—always an act done with regret, and seldom by a woman of the character and social position of the decedent, except when impelled by a passion which would consent to any sacrifice for the object of

BAKER'S WILL.

her love. And his influence was sufficient, after the marriage had been kept secret for months from her family, to whom she was fondly attached, to consent to clandestinely leave the protection of the household, with the man who had inspired and fostered the passion, to go to a distant State and accept his doubtful protection instead. An influence sufficient to accomplish these results, is equal to procuring the execution of a testamentary instrument from the decedent, which would give the chief actor a life interest in a portion of her estate, and this I hold to have been affirmatively proven in this case; and certainly the one most interested in sustaining the instrument has failed to convince me, as under the law he should do, in view of his relations with the decedent, and of all the facts and circumstances which have been developed in the proofs, that no sinister means were used by him to secure the bequest in his favor.

As the case stands, with its concomitant features of fraud and concealment, on the part of John A. Baker, if not of false testimony on the part of his instruments, in the Minnesota Court, to do away with the natural effect of his previous courtship, marriage and divorce, the knowledge of which by others threatened to defeat the object of another scheme of marriage, there is sufficient, in my judgment, to warrant me in holding that both the marriage and the bequest by the decedent, were obtained by Baker, under the belief that no cloud rested upon his right to become her husband, and without which influence the bequest to him would not have been made.

The validity of the bequest is matter independent of and not affecting the validity of, the other provisions of the instrument, and is presented to me as a question within my jurisdiction, under section 11, chapter 329, of the Laws of 1870. Under that Statute, my power is

DAMARELL v. WALKER.

clear, though the authority conferred by it, so far as my knowledge extends, has never been the subject of examination by an appellate court. But long anterior to the enactment, Justice ROBERTSON decided in the *Matter of Walsh*, (1 Redf. 238), that the Surrogate has power to sustain a portion of a testamentary instrument while rejecting the residue. I should be reluctant, however, to lay down such a rule in the absence of a well-defined authority, and this I find in the Statute referred to. Hence, while I am impelled to hold the provisions making the bequest to Baker void through undue influence, I admit the instrument, in its other provisions, to probate.

Decree accordingly.

NEW YORK COUNTY.—ROBERT C. HUTCHINGS, SURREGATE.—
DECEMBER, 1875.

DAMARELL v. WALKER.

*In the matter of the Guardianship of KATE W. SHEPHERD,
an infant.*

A citation to answer a petition to remove a guardian must be served on the guardian, although she be incapacitated by insanity.

The "incompetency" for which a Surrogate may remove a guardian under 2 Rev. Stat. 152, § 14, has relation not merely to the mental condition and moral status of the guardian, but the court may take into consideration the relative, social and pecuniary position of the guardian and the infant, as affecting the interests of the latter in respect of nurture, care, education and safety.

The Surrogate has power to remove a testamentary guardian on grounds which will warrant the removal of a general guardian.

The fact that a will by which a guardian is appointed for an infant child of the testator, had been admitted to probate, there having been no

DAMARELL T. WALKER.

contest on the question of testamentary capacity, will not preclude the court from passing upon the question of the testator's mental condition, on a subsequent application to remove the guardian.

Previous insanity of testamentary guardian,—how far a ground for removal.

THIS was an application on the part of Mrs. Elizabeth T. Damarell to set aside an order of the Surrogate, made November 21st, 1873, removing her as testamentary guardian of Kate W. Shepherd, an infant under fourteen years of age; and a further application on behalf of Abby J. Walker to remove Mrs. Elizabeth T. Damarell, as testamentary guardian of the said infant.

On the 26th day of September, 1873, Samuel C. Shepherd, died leaving an infant daughter—his only child—of the age of about six years. She was his only heir and next of kin, his wife, the mother of the child, having died several years before. On the 6th day of December, 1870, Mr. Shepherd, made his last will and testament, which was regularly admitted to probate by the Surrogate of the county of New York on the 17th day of October, 1873, the proper citations having been previously issued and served. No opposition was made to the probate of the will. By this will, the testator appointed Mrs. Elizabeth T. Damarell the testamentary guardian of his infant daughter, Kate W. Shepherd. After the will was admitted to probate, and on the 23d day of October, 1873, Sarah W. Shepherd, claiming to be the paternal grandmother of this infant child, presented a petition to the Surrogate praying for the appointment of James E. Ward as the general guardian of the person and estate of this child. A citation was issued to Robert McC. Shepherd, Sophia C. Davis, Mrs. E. A. Chitton, Edward J. Walker, Emily H. Walker, and Abby J. Walker, requiring them to appear on the 10th day of November, 1873, and show cause why letters of guardianship should not be issued, as prayed for in the petition.

DAMARELL F. WALKER.

Subsequently, and on the 18th day of November, 1873, a counter-petition was presented to the Surrogate, by Edward J. Walker, Emily H. Walker, and Abby J. Walker, praying for the appointment of Emily H. Walker as such guardian. Mrs. Damarell, who was appointed by the will of Mr. Shepherd testamentary guardian of his infant child, was not made a party to, nor notified of, either of these proceedings. On the 21st day of November, 1873, an order was made by the Surrogate, appointing Emily H. Walker the guardian of the estate and person of said infant in the place and stead of Elizabeth T. Damarell.

Mrs. Damarell at this time did not know that she had been appointed testamentary guardian by the last will and testament of Mr. Shepherd. She was not aware of her appointment until a long time afterwards. On the 21st of November, 1874, Mrs. Damarell presented to the Surrogate her petition setting forth the foregoing facts, and praying that the order of November 21st, 1873, by which she was removed and Miss Emily H. Walker appointed the guardian of the infant child, Kate W. Shepherd, be opened, set aside, and vacated. On the 26th of January, 1875, Miss Abby J. Walker presented her petition praying that Mrs. Damarell might be removed from the guardianship of the child, Kate W. Shepherd. Miss Walker alleged in her petition that the testator, Samuel C. Shepherd, was of unsound mind, and that the appointment of Mrs. Damarell as testamentary guardian was void and of no effect. She also alleged that Mrs. Damarell was, at the time of the death of Samuel C. Shepherd, and for a long time prior thereto, had been, of unsound mind, and that, by reason of such unsoundness, she was still incompetent to be such guardian of the infant child, Kate W. Shepherd, and to discharge said duties.

DAMARELL v. WALKER.

On the 14th of February, 1875, Mrs. Damarell answered the petition last referred to, and put in issue the material facts therein set forth. She denied the insanity of Samuel C. Shepherd, and her own unsoundness of mind, and alleged the unfitness of Miss Walker as guardian of the child. The testimony was taken in both proceedings at the same time, and it was understood that the testimony, as far as applicable, should apply to both proceedings, viz. : the proceeding on the part of Mrs. Damarell to set aside the order of November 21st, 1873, removing her as guardian, and appointing Miss Walker; and the proceeding upon the petition of Miss Abby J. Walker (presented the 26th of January, 1875) to remove Mrs. Damarell as testamentary guardian.

DAVID R. JAKUES, *and* HENRY L. CLINTON, *for Mrs. Damarell.*

JOSEPH H. CHOATE, *opposed.*

THE SURROGATE.—The facts in the case are briefly as follows :

Mr. Shepherd was a member of a successful firm of shipping merchants in the city of New York, and resided on Thirty-fifth Street at the time of his death, which occurred by suicide in September, 1873. He had lost his wife in 1868, five years before his own death. She died shortly after giving birth to the infant, the custody of whom is the matter now at issue. Mrs. Damarell was employed as the monthly nurse of Mrs. Shepherd at the time of the birth of the child, and she remained in the house thereafter for a period of a few days from Mrs. Shepherd's death. Some weeks subsequently, on the recommendation of Dr. F. N. Otis, the family physician, she was employed by Mr. Shepherd as housekeeper, and was entrusted with the special care of the infant, in which position she remained employed continuously until the latter part of 1872.

DAMARELL v. WALKER.

Mr. Shepherd was married to Miss Kate Walker, the mother of his child, about the year 1858. His wife was a member of a very intelligent and wealthy family, residing and occupying a high social position in the city of Boston. After their marriage, Mr. and Mrs. Shepherd kept house in Brooklyn and New York, until the time of the wife's decease, and thereafter he continued the establishment until his death in September, 1873.

Subsequent to the death of his wife, Mr. Shepherd became subject to periods of great mental depression and melancholy, as proven by the testimony of Mr. Ward and Mr. Booth, his partners, Mr. Taebing, Dr. Otis, Mrs. Culbert, and Mr. Bergen. The despondency which overcame him at these periods was so deep, that he announced that he expected to die in an insane asylum; that his firm had sustained great losses, and that ruin was impending, when in fact they were in the midst of great prosperity; and under such belief, he even curtailed his household expenses to an almost absurd extent. He wrote to his wife's sister, Miss Abby Walker, a month before the date of making his will, a letter, in which he spoke of great financial embarrassments; and a year after, when he had recovered from the attack, upon the return of Miss Walker to America, he reminded her of the letter, and stated that what he had written was untrue, and that at the period when it was written, he was insane.

It is not necessary for me to state in detail the evidence upon the question which has been raised, as to Mr. Shepherd's own insanity; but I am of the opinion that he was a victim of that phase of mental impairment described as melancholia, and which had its culmination in suicide by shooting himself with a pistol, in September, 1873.

Mr. Shepherd's will was subsequently offered for pro-

DAMARELL v. WALKER.

bate. No one appeared to contest the justness of its provisions, else perhaps the validity of the instrument, and especially of the clause appointing Mrs. Damarell the testamentary guardian of the child, might have been contested *in limine*, on the ground of his own insanity, and a decision might have been had thereon.

Mrs. Damarell being then confessedly insane, and the child being left without any one to take legal charge of her person and property, a petition was filed by Mrs. Shepherd, the paternal grandmother, asking for the appointment as guardian of Mr. Ward, Mr. Shepherd's late partner; and another was filed by Mr. Edward J. Walker, asking for the appointment of Miss Emily H. Walker, a maternal aunt. The two petitions were considered in the one proceeding. There probably would have been no disagreement at the beginning had not papers been found after Mr. Shepherd's death, which shewed that he had a hostile feeling towards his wife's sisters, the Misses Walker. But on the hearing before me, November, 1873, the testimony of the Misses Walker and other witnesses proved that the feelings of Mr. Shepherd had been based upon an absolute delusion in reference to the facts, and the application of Mrs. Shepherd, the grandmother, was withdrawn, and by consent, Miss Emily H. Walker was appointed to the guardianship, with the entire approval, so far as known, of all the relatives of the child.

Mrs. Damarell, although the testamentary guardian, had no part in that proceeding, nor was she cited on it, which was undoubtedly an oversight, and was fatal to the order which I then made, so far as it purported to remove her from the position to which she had been appointed by the will. The statute requires a citation to be served upon a testamentary guardian, upon an application for removal. But the evidence shows that, had

DAMARELL v. WALKER.

a citation been issued to her, she was then in no condition to appear at the hearing, and assert her claims to the child, or to exercise the functions of guardian. Indeed, she slept upon her rights for a year subsequent to the granting of the order removing her and appointing Miss Walker, before she came to court, through her counsel, to demand a recognition of her rights under the will. The reason of this will be the subject of consideration hereafter; but as the rights of Mrs. Damarell were not affected by the first proceeding, by reason of her not being made a party thereto, the order then granted, so far as it purports to remove her, should be vacated, and a decree will therefore be entered to that effect.

The proceeding, therefore, now before me, is upon the application of Miss Abby J. Walker to remove Mrs. Damarell, as testamentary guardian, on the ground of incompetency, and for the appointment of Miss Emily H. Walker, a maternal aunt, who now has custody of the child under the previous order appointing her to the guardianship. The statute upon that subject is as follows:

“On the application of any ward or of any relative in his behalf, or of the surety of a guardian, before the Surrogate who appointed any guardian, or to the Surrogate before whom any last will and testament containing an appointment of a guardian shall be or shall have been proved, complaining of the incompetency of such guardian, of his wasting the real or personal estate of his ward, or of any misconduct in relation to his duties as guardian, the Surrogate, upon being satisfied by proof of the probable truth of such complaint, shall issue a citation to such guardian to appear before him, at the day and place therein specified, to show cause why he should not be removed from his guardianship.” (2 *Rev. Stat.* 152, § 14.)

DAMARELL T. WALKER.

The word "incompetency," as applied to guardianship, is one, in my judgment, of broad signification and comprehensiveness, like the word unsuitableness, as applied to a trustee. In my opinion, it has relation, not merely to the mental condition and moral status of a testamentary guardian, but imports that, in the interests of the child in respect of nurture, care, education, and safety, the court may take into consideration the relative, social and pecuniary position of the guardian and the infant. I must admit frankly, that, in the full appreciation of the discretion that is vested in this as in all courts having jurisdiction of the guardianship of minors, who are, in fact, wards of the court, my judgment is averse to the separation of a child, bereft of its parents, from its parents' relatives who are fitted to take their place, and especially from one who, through ties of sisterly affection to the mother, clings to a child with as much affection as though she were her own, and, still further, where there is reasonable ground to believe that there is incompetency on the part of the person named as guardian in the will. The fact that the Legislature has empowered the court to remove such guardian for incompetency, vests it with discretion to decide upon the competency of the person named for the position in the will of a testator. Suppose Mr. Shepherd, a man of wealth and high social position, had, in making his will in 1870, (when I am satisfied from the evidence he was in a disordered mental condition), selected an inferior domestic in his house as the guardian of his child, would it not be within the province of the court, considering the social status of the parents and of the families to which they belonged, the child being the inheritress of wealth, to removed such person from the guardianship, and to vest it in others of undoubted "competency" or fitness? To my mind there would be no question in reference to its power.

DAMARELL v. WALKER.

A letter written by Mr. Shepherd soon after the death of his wife, to her sister, Miss Abby Walker, shows that he regarded her as the one, above all others, to whose care and nurture the child should be confided, though, two years after, he executed a will, in which he appointed as testamentary guardian, Mrs. Damarell, a stranger to the blood of himself and wife, and whose social position and education were below that of the child's parents. In view of his previously expressed feelings in reference to Miss Walker, his sudden change of sentiment exhibited in the appointment of Mrs. Damarell is only to be ascribed to the fact of an insane condition, which had its manifestations in the manner I have previously described, and in imaginary slights which he stated he and his wife had received at the hands of her sisters; and which was further manifested in the extravagant views he expressed in reference to the importance of the recovery of Mrs. Damarell to the interests of his household, and especially of his child. In fact, it is evident to my mind that both the testator and the testamentary guardian were insane—the affliction overcoming Mr. Shepherd in the fall of 1870, about the period when the will was executed, and Mrs. Damarell a year subsequent, in the fall of 1871.

In reference to the insanity of Mrs. Damarell, there is, in my opinion, no doubt. Between the fall of 1871 and the period of Mr. Shepherd's death, she had two distinct attacks. She recovered from the first and remained in an apparently normal condition for about six months, when she had a relapse, from which she had not recovered at the time of Mr. Shepherd's death; nor did her friends deem her in a condition to apply for a recognition of her rights as testamentary guardian until more than a year after his death. Before this affliction overcame her, the evidence shows that she was calm

DAMARELL v. WALKER.

and self-possessed; that afterwards she lost control of her nervous system, and was depressed, and exhibited symptoms of mingled melancholia, hypochondria and hysteria, so much so that Dr. Peaslee, her physician, stated that her brain was a "great deal affected," and he considered it better that she should not be left alone. Dr. Otis, though not her physician, had frequent opportunities of seeing her at Mr. Shepherd's house during this period, and he testified on the first proceeding, in the fall of 1873, to her unfitness to take charge of the child on account of her mental disorder, which he then pronounced a case of suicidal mania. And though Dr. Otis, when subsequently called in the present proceeding, as a witness in behalf of Mrs. Damarell, qualified his previous testimony, there is no doubt upon the evidence that she was for a long period insane.

But, in behalf of Mrs. Damarell, it is contended that the mental disturbance which affected her proceeded from the cessation of a function peculiar to women, and occurring in middle age; and both Dr. Peaslee and Dr. Otis stated that the cause of the mental disturbance having passed never again to return, there was, in their opinions, no danger of recurrence of the disorder.

The question, therefore, which is presented to me at this time is whether Mrs. Damarell, though at present apparently recovered, is in such condition as to justify me in deciding that it would be safe to entrust her with the guardianship of the person of the infant, she having been, within a short period, twice a subject of insanity.

Mrs. Damarell has appeared in court during these proceedings, and she is apparently sane. She has testified in the case as a witness, and exhibits now, I am frank to say, all the evidences of recovery; but it is, however, very difficult to state whether a person who has been insane is free from the danger of a recurrence

DAMARELL v. WALKER.

of the malady, and I might say it is always difficult for a court, and sometimes even for physicians, to decide whether a person thus affected has, in fact, recovered. The fact that Mrs. Damarell appears in court, and that she acts and speaks rationally, is not conclusive to me, a layman, of her absolute recovery. Courts are often obliged to have recourse to the aid of professional gentlemen who have become experts through education, observation and experience in the determination of this most abstruse question of insanity.

Two physicians have been called on each side upon the question of the liability of a recurrence of the mental disease which overcame Mrs. Damarell—Dr. Otis and Dr. Peaslee in her behalf, and Dr. Choate and Dr. Clymer in behalf of Miss Walker. Dr. Otis has had no special experience in the treatment of diseases of the brain, and his views upon the subject of a non-recurrence of the mental disturbance of Mrs. Damarell are based upon the theory that, as the cause which incited the insanity cannot occur again, there is no likelihood of her again becoming insane. Dr. Peaslee has had a much larger experience—his specialty being the treatment of diseases of women—and he states that out of probably fifty cases of mental disturbance, occurring at the period of the female climacteric, which have come under his observation, he has not had more than ten worse than that of Mrs. Damarell; that of those ten, probably five died, and of the other five, some committed suicide. Certainly, based upon Dr. Peaslee's own showing, the occasional violence in the manifestation of the insanity does not afford a satisfactory assurance of safety to one entrusted to Mrs. Damarell's care, in case of a recurrence.

Dr. Clymer and Dr. Choate, very distinguished alienists, and who have had long experience in the treat-

DAMARELL v. WALKER.

ment of diseases of the brain and nervous system, have given their testimony upon the subject of a liability to a recurrence of insanity in Mrs. Damarell, and I regard their statements as entitled to great weight. All I consider necessary in this connection is, to generalize their conclusions, based upon carefully collated statistics, which show that the liability to a recurrence of insanity, where persons have once been affected, is from fifty to sixty-five per cent., and that they see no reason for supposing that insanity occurring at the time of the female climacteric should form any exception to the general rule. They believe that the cessation of the sexual function, occurring at that time, it being a natural and normal event in the course of woman's life, should not, of itself, be the cause of insanity, and that, if insanity does occur as its concomitant, it is where there has been latent disease of the brain existing previously, or an inherent constitutional tendency to such disease, which is called into activity by the physical disorders attendant upon cessation of the sexual function referred to

The cross-examination of these experts by the counsel for Mrs. Damarell was able, elaborate and exhaustive; but, in my opinion, it failed to alter the aspects of their testimony, which was, that Mrs. Damarell, having had two attacks of insanity, the probability of another was further increased. I must accept their evidence as controlling, as all courts are obliged to accept that of distinguished experts in those branches of science to which they have devoted their lives.

It has been stated in evidence, that Dr. Hammond and Dr. Brown, of the Bloomingdale Asylum, both specialists of large experience in the treatment of mental diseases, were called by Mrs. Damarell's friends to see her, during the year 1874; but neither of them has been produced as a witness, which is to be regretted, as doubtless their testimony would have thrown addition-

DAMARELL v. WALKER.

al light upon the matter at issue, they having had the advantage of a personal observation of Mrs. Damarell, which neither Dr. Clymer nor Dr. Choate had.

Certainly, Mrs. Damarell, at the time of the death of Mr. Shepherd, was not, and had not been for over a year previous, nor was she for months afterwards, by reason of her insanity, a proper person to have the custody of the child. The evidence which has been given of her incompetency, during that period, is not disputed. It is impossible to predict what may be the ultimate condition of a person who has been afflicted with a mental aberration. Who could have foreseen that Mr. Shepherd, who exhibited only irritability, depression of spirits, suspicions of his partner's sentiments towards him, and of his wife's sisters, and misjudgment of the importance of Mrs. Damarell, in respect to the care of his child, would, within a brief time, have committed suicide with a pistol? In view of this tragic culmination of insanity in this very household, without recurring to the illustrations in medical literature, it appears to me that I would be taking a responsibility which no court would be justified in doing, were I to give this child to the care of a testamentary guardian, who has been twice insane, and confessedly incompetent for a long period to assume a trust which was given to her by the will of Mr. Shepherd; and in this serious aspect of the case, I cannot assume it.

There is another consideration which has some weight with me in the disposition of this case. The counsel for Mrs. Damarell strenuously object to her removal as testamentary guardian. But the responsibility placed upon me is a grave one, even viewed in respect of the interests of the child. Two considerations as affecting her, present themselves to my mind. One is, that her comfort, happiness, culture and education are reasonably assured, under favorable circumstances

DAMARELL v. WALKER.

and surroundings, in the care of her aunt, the present guardian; the other is a want of such assurance, even with the best of intentions, in view of disparity of social position and education between Mrs. Damarell and the family of the child. The aunt is a lady of wealth, education, and refinement, occupying a superior position in New York and Boston society. The child, who is the principal object of her affection, as representing a deceased sister, between whom and herself great affection existed, is now about eight years of age, and has been two years under her present guardians, and undoubtedly, regards her with the same feelings she would entertain for her mother, if living. Mrs. Damarell, on the contrary, is a lady in very moderate circumstances; and though married, is not living with her husband, and has not been since her advent into the house of Mr. Shepherd, in the year 1868. Her previous employment had been that of a monthly nurse. She has no income, and her testimony shows that she has had limited facilities for obtaining education, not having attended school since she was twelve years of age; while she is no connection by blood with the child proposed to be placed in her care. Her acquaintance with Mr. Shepherd's family, and the care she exercised over the child until overcome by her own mental disabilities, were the result of accidents—the child's birth and the mother's death.

I am asked, under the forms of law, to separate the child from its natural guardian; to remove her from associations which she is entitled to continue from the condition of her birth; to deprive her of the opportunities of education and of her proper place in society, which are now reasonably assured, and virtually to place her in a lower station in life, with associations which cannot be congenial, and to deprive her of that affection to which she has been accustomed during the last two years.

 BAILEY v. STEWART.

It would be a most serious act for me to perform. It would be little less than judicial cruelty; and a court, in my opinion, would not be justified in so doing. But, in deciding the matter at issue, I am not governed by those considerations, except collaterally. In view of the statute, especially taking the word "incompetency" in its broad signification of unsuitableness, and applying it to the past condition of Mrs. Damarell, and with the possibility, even, of a recurrence of her mental disorder and its consequences upon the destiny of the child, I hold that the application of Miss Abby J. Walker, for the removal of Mrs. Damarell, as testamentary guardian should be granted, and a decree to that effect will therefore be entered, and leave the appointment of Miss Emily H. Walker, as guardian of the child, heretofore entered, with the bonds given thereunder, to remain in full force and effect.

Ordered accordingly.

NEW YORK COUNTY—HON. D. C. CALVIN, SURROGATE.—APRIL, 1876.*

BAILEY v. STEWART.

In the matter of proving the instrument propounded as the last Will and Testament of ALEXANDER TURNEY STEWART, deceased.

If a petition for probate, verified by the person most likely to know,—e. g. the testator's widow,—alleges that he left no heirs, next of kin or relatives, whatever, the issue of citations is unnecessary.

On an application to vacate probate, on a petition alleging undue influence, &c. if the proponents of the will move to dismiss the petition before opportunity to take proofs is given, their motion must be determined upon the assumption that all the allegations of the petition are true.

*DELANO C. CALVIN, Esq. was appointed by the Common Council, April 12th, 1876, to fill the vacancy caused by the death of Stephen D. Van Schaick, who had been elected at the previous November general election. Mr. Calvin was elected to the office of Surrogate at the general election, November, 1876.

BAILEY v. STEWART.

The Surrogate has power to open, vacate, or modify, his probate of a will, whether of real, or personal estate, or both.

The probate is not merely dependent on, and effected by, the proofs taken: but the Surrogate's decision on the sufficiency of the proofs, which the statute requires him to enter in his minutes, is a determination of the court upon the proofs submitted.

By parity of reasoning, if probate were refused by mistake or misapprehension, the decree refusing it should be opened, and the application reheard.

The Surrogate of the city and county of New York, has, by the act of 1870, the same power to open, vacate and modify his orders and decrees, as is exercised by a court of general jurisdiction.*

This power is equal to that exercised by a court of equity on a bill filed for relief against a judgment or decree, for fraud or mistake.

An application to the Surrogate of the city and county of New York to open his decree, is not matter of legal right, but is addressed to his discretion, to be exercised with a just regard to the interests of the respective parties.

By the term "discretion" here, it is not meant that his decision of the application would not be reviewable, but such a discretion is intended, as would justify the granting or denial of the application, according to the circumstances and equity of the case.

Judicial discretion never means the arbitrary will of the judge; it is always legal discretion, to be exercised in discerning the course prescribed by law; when that is discovered, it is the duty of courts to follow it; it is to be exercised not to give effect to the will of the judge, but to that of the law.

It is a judicial balancing of the rights and remedies of the respective parties, which constitutes the right exercise of judicial discretion.

The probate of a will of real property, is only *prima facie* evidence of the validity of the will, which may be impeached by the heirs in an action.

Hence probate of such a will, if void, would be no obstacle to the remedy of the heir in an action.

Where a petition shows a case conferring jurisdiction upon a Surrogate, he has authority to act in the premises; and a subsequent discovery of persons interested, who were entitled to, but did not have, notice, because their existence was denied by the petition does not render his decree void. At most it would only render it inoperative as to their interest.†

*As to the power of the court to relieve parties from the controlling effect of probate, see *Booth v. Kitchen*, (7 Hun, 260.)

†See *Roderigas v. East River Savings Bank* (63 N. Y. 460 *rev'd* 48 How. Pr. 166.) *Mariot v. Mariot* (1 Strange, 671). *Dickinson v. Hayes*, (31 Conn., 417.) *Charles v. Hubor*, (78 Pa. St. 489.)

BAILEY T. STEWART.

The provision of the act of 1870 restricting the remedy for impeaching a decree of the Surrogate of the city and county of New York, to a proceeding by appeal, does not apply against one who was not a party to the proceeding in which the decree was made.

On an application to open a decree to allow one who was not a party to the proceeding to adduce proofs, the court should not pass upon the probability or unprobability of the case alleged in the applicant's petition.

Testator left a widow, and a very large real and personal estate, and an active business. A petition by the widow for probate was presented alleging that he left no heirs, next of kin, or relatives whatever; and the will was admitted to probate immediately without the issue of any citation. Subsequently a petition was presented by one claiming to be an heir, asking that the probate be opened, and proofs taken, and alleging that the will was invalid for undue influence. On the hearing, the petitioner consented that the probate stand as to personal property, and pressed the application only as to the will as a will of real property. *Held*, that as the heir might impeach the will as to real property by action, notwithstanding probate, and as the title to a very large amount of real estate would be discredited, and the execution of the testator's intentions hindered, by opening the probate, the application should be denied.

THIS proceeding was instituted upon an order to show cause why the pretended probate of the instrument propounded as the last will and testament of Alexander Turney Stewart, deceased, as a will of real and personal estate, and the apparent decision thereon, should not be adjudged void, revoked, vacated, and set aside.

The order to show cause was based upon the petition of James Bailey, in his own right, and on behalf of the other collateral relatives of said Stewart named in the petition.

The petition alleged that the petitioner and others named therein, were collateral relatives of the full blood, and heirs at law, and next of kin of the late Alexander Turney Stewart, who died April 10th, 1876; that the paper bearing date March 27th, 1873, purporting to be the last will and testament of said Stewart, appointing Henry Hilton, and William Libby, executors, and

BAILEY V. STEWART.

Cornelia M. Stewart, executrix thereof, and the codicils thereto, one dated March 27th, 1873, and the other March 28th of the same year, were in the evening of April 13th, 1876, presented to the Surrogate for probate.

That on the 14th of the same month letters testamentary were issued, and said will and codicils were recorded in the Surrogate's office as duly proved.

That no citation or notice to appear was issued, or directed to be served upon the petitioner, any of the heirs at law, or next of kin, as required by law, nor issued to, or served upon, the Attorney General of the State; that no opportunity was afforded to the petitioner, or any of the said heirs, &c., to require all the witnesses to the will, &c., to be summoned, or to request other witnesses to be examined, or to be present at, or contest the proof of said will.

That the probate and record thereof, were not made publicly, at the Surrogate's court room, or office, but privately, in unusual haste, on the day of the funeral of said Stewart, without notice to petitioner, or said heirs.

That said papers were not the last will and testament, and codicils of said Stewart, that they were obtained, and the execution thereof by said Stewart was procured, by circumvention, and undue influence practised upon him by Henry Hilton, or some other person unknown to the petitioner.

That the petitioner and others of said heirs, contested the probate of said will.

That Cornelia M. Stewart, and Henry Hilton, were the only legatees, or devisees, named in the will, and the only legatees, or devisees, named in the first codicil were George B. Butler and others named, and that the only legatees and devisees named in the second codicil were Charles B. Clinch and others named therein.

The petition prayed that the probate of the will and

BAILEY T. STEWART.

codicils, and the decision thereon, might be declared void, revoked, vacated, and set aside, and for such other relief, etc., as might seem proper.

On the return day of the order to show cause, the counsel for the executors and executrix, and for Mrs. Stewart, and Mr. Hilton, individually, appeared and moved that the proceedings so far as they sought to revoke, vacate, or set aside the will in question, as a will of personal estate, be dismissed—to which the counsel for the petitioner consented, stating that they made no claim, so far as the personal estate was concerned; and the proceedings to that extent were dismissed.

The widow, Cornelia M. Stewart, filed her answer to the petition, which set forth substantially, her marriage to the testator, 16th October, 1823, and that she lived with him as his wife, in the city of New York, until his decease, April 10th, 1876.

That she had no knowledge, or information, sufficient to form a belief, whether the petitioner, or the persons named, were collateral relatives of her said husband, and therefore denied the same—that the will and codicils were duly proved April 13th, 1876, and admitted to probate, as a will of real and personal estate and letters testamentary were issued to the persons named therein as executors, who qualified, and that the will and codicils were duly recorded, as duly proved.

That the application for such probate, and the proofs thereof, were publicly, and openly made.

That the testator at the time of his death was extensively engaged in mercantile affairs, and the improvement of large amounts of real estate, employing a large number of persons, and that to save the business from interruption, and the estate from loss, it was essential that no cessation in the management of its affairs should take place;—and as the Surrogate could not attend on

BAILEY v. STEWART.

the following day, proofs were made on the evening of the funeral for her convenience; that she had been informed by the testator that he had no relatives, or next of kin living, and she had no intimation, or suspicion, that he left him surviving collateral relatives, heirs at law, or next of kin. That her allegation in her petition for the probate, in that respect, she believes to be true—that said papers are the last will and testament and codicils of the testator, and the uninfluenced and intelligent acts of her deceased husband; and she denies on information and belief, that they or either of them, were obtained by undue influence, practised by said Hilton, or any other person. That she had never heard her deceased husband speak of the petitioner, or of the other persons named in the said petition, as his relatives—that he had never recognized them as such.

The executor and executrix also filed an answer setting forth substantially the same facts as are contained in the answer of Mrs. Stewart.

Henry Hilton also filed an affidavit setting forth that he knew the deceased intimately for over twenty years;—that he drew the will and codicils under the direction of the testator, who was in the full vigor of his intellect and memory,—that no other persons were present when such directions were given,—that he did not influence, or attempt to influence, the testator and does not know of any other person doing so.

That until after his death he never communicated the contents of said will and codicils to Mrs. Stewart or to any other person.

That for many years past he has been in the employ of said testator, assisting, and conducting his affairs, having general knowledge thereof, and of his plans.

That testator's business has for many years required the constant employment of many thousands of persons here, and in Europe.

BAILEY v. STEWART.

That during deponent's acquaintance with him, the deceased has personally directed, managed, and controlled his business, and his employees to the fullest extent, and did so up to within a few days of his death.

That he had frequently heard him say that he did not know of the existence of any blood relatives, as had been generally stated in the newspapers in this country and in Europe.

That he had been a frequent guest at his table, and has never seen any person whom he recognized as a blood relative.

That he had general charge of his affairs, under the direction of the testator, particularly as to his individual property, and was acquainted with his various plans, &c

That under a power of attorney from the widow, the deponent had continued the carrying forward of such plans,—stating them with some detail.

That expenditures for that purpose had exceeded \$350,000, and that other projects mentioned would incur an expense of \$300,000 more, and may reach half a million.

That work was continued on the public institution, for the benefit of working women, (an institution projected, and commenced by the testator in his life-time) the completion of which would involve an additional expenditure of \$350,000; that since testator's death, there had been paid and extinguished financial engagements to the amount of millions of dollars, besides the specific legacies named in the will, and upwards of \$200,000 to employees, pursuant to testator's letter to his wife.

That the deponent had a last will and testament in his possession, duly made and executed by the testator in his life-time, dated May 1st, 1855, by which he gave and devised his entire residuary, real and per-

BAILEY v. STEWART.

sonal estate, to his wife, after certain legacies, less than those contained in his last will, which former will deponent received from Mr. Stewart some months after the execution of his last will.

William Libby, the other executor, filed his affidavit stating his acquaintance with the deceased, for upwards of seventeen years; the deponent was general manager of the wholesale business, and in July, 1867, became a partner of the firm of A. T. Stewart & Company, and continued as such to testator's death; that their intercourse was constant, and that so far as it was possible for one man, the testator actually and personally controlled his business till within a few days of his death; this practice was constant after March, 1873, as before

That from deponent's knowledge, it was absurd to say that undue influence could control him, in making his will, or in doing any other act, in reference to his property.

That the deponent had never heard or known of any one, claiming to be a blood relative of his, or that he acknowledged any such, but it was generally understood, that he had none, and deponent so believed.

The proceedings on the probate together with the alleged will, and codicils as recorded, were made part of these proceedings.

Prior to the presentation of the answers, and affidavits above stated, the counsel for the executors, and executrix took preliminary objections, and moved to dismiss the petition on the ground that as a will of real and personal estate, the court had no authority to set aside the probate, under the act of 1870, because such probate was not dependent upon an order, or decree, and was only *prima facie* evidence, liable to be impeached by any person claiming rights in hostility to the will. That the petitioner had not made a *prima facie* case

BAILEY v. STEWART.

calling for answer, as the statute provides that when the Surrogate shall be satisfied, that the proofs are such as are required by the statute, his certificate and the proof endorsed thereon, entitle the paper to be read in evidence, and that the act of 1870, does not give the Surrogate power to vacate, or set aside such certificate, that as the motion is made upon proceedings already had for probate, and the only ground urged against the validity of the will was undue influence by Mr. Hilton, or some person unknown, the burden of proof of such undue influence was with the petitioner, and that if the petitioner should succeed in opening or vacating the probate, his position in respect to the real estate would not thereby be improved, or affected.

The decision on this preliminary motion to dismiss was reserved, until the facts were presented, with leave on the part of the executor and executrix to renew the motion on the whole case.

After the answers and affidavits were filed in opposition to the petition, counsel for the petitioner offered to give evidence of the facts set forth in the petition by production of witnesses; but the motion to dismiss on all the papers was elaborately argued on both sides, and submitted for the purpose of the decision.

H. L. CLINTON, WM. A. BEACH, H. E. DAVIES, and H. H. ANDERSON, *for the Executors*, HENRY HILTON and Mrs. STEWART.

W. O. BARTLETT, E. ROOT, and W. D. BOOTH, *for the petitioner*

THE SURROGATE.—The counsel for the executors and executrix in their argument of this motion have discussed with great earnestness the force and effect of the facts set forth in the respective answers and affidavits presented in their behalf, and urged the improbability of the alleged undue influence upon the testator by Mr. Hilton, and by others unknown; but it is clear to my

BAILEY v. STEWART.

mind that this motion to dismiss, must be considered upon the assumption that the allegations contained in the petition are true, and no benefit can be derived to the parties making the motion, from the facts alleged by them ; for the motion is based upon the alleged absence of reasonable ground set forth in the petition for the opening and vacating of the probate, and if the answers are to be regarded, they must be accepted as forming issues of fact for the purpose of presenting proofs to establish those issues, and the petitioner would be entitled to the opportunity to prove the allegations set forth in the petition with leave on the part of the proponents of the will, to contradict them, and show their truth.

The petition after alleging that the petitioner and others are collateral relatives of the full blood, and heirs at law and the next of kin of the testator, states that the will and codicils were presented to the Surrogate, on the 13th day of April, 1876, and application made for their admission to probate and record, and that letters testamentary were issued on the next day, and the said will and codicils were recorded in said office as duly proved, without citation to the petitioner, or the other persons alleged to be heirs at law, or next of kin, as required by chap. 460, of the Laws of 1837, and without citation to the Attorney General of the State; and that thereby the claimant was deprived of the opportunity to require all the witnesses to said will to be produced and examined, or to require other witnesses to be examined, according to the Act of 1841, chapter 129.

It appears by petition of the widow duly verified by her on the 13th day of April, 1876, and on which the petitioner moves and which was presented to the Surrogate praying for probate of said will and codicils, that "the widow, only heirs, and next of kin of said

BAILEY v. STEWART.

deceased was the petitioner"—that said deceased left him surviving neither father, mother, brother, or sister or descendants of any or either of them, or any descendants of his, or any relative or next of kin of said deceased.

On this proof, and on the faith of the allegations contained in said petition, the proceedings of probate were taken, and upon the assumption of their truth, it is entirely clear that there was no need of issuing citations to persons thus clearly proved not to exist.

The third subdivision of section 5, of chapter 460, of the Laws 1837, provides that if the will relate to both real and personal estate, the names, places of residence of the heirs, widow, and next of kin of the testator shall be ascertained by the Surrogate, by satisfactory evidence, and section 7 provides that the Surrogate shall thereupon issue a citation requiring the proper persons to appear and attend the probate of the will, and prescribes certain facts which shall be alleged in the citation. Section 8 provides for the service of such citations. Section 9 provides that, before proceeding to take the proof of any will, the Surrogate shall require satisfactory evidence, by affidavit, of the service of the citation, in the mode prescribed by law.

The *proper persons* referred to, in section 7, are evidently the heirs at law, and next of kin, if any exist.

In this case, the Surrogate *did ascertain by satisfactory evidence*, and by the oath of the person most likely to know, that there were neither heirs at law, or next of kin, and the provisions of the statute referred to were fully complied with, and complete jurisdiction obtained for the purpose of probate.

It is important, *first*, to determine the power of this court to open, vacate, or modify the probate in this case; for while the petitioner's counsel invoke that power as a

BAILEY v. STEWART.

matter of right, it is objected by the counsel for the executors and executrix, that as to a will of real estate, there is no power, to vacate, or modify the decision or decree, admitting the will and codicils in question to probate :

First, because the probate is not dependent upon an order or decree of the Surrogate, but upon proofs on which he is required to make his certificate whereby it becomes only *prima facie* evidence. (2 *Rev. Stat.* 58, § 15.)

Second, because the statute providing for the filing of allegations against a will of personal property within a year after its probate, makes no provision for the review or opening, vacating or revoking a will or real estate; and to sustain this latter point, the case of the will of *Kellum* (50 *N. Y.*, 298)* is cited.

By section 21, of chapter 460, of the Laws of 1837, concerning proof of wills, &c., it is provided that the Surrogate shall enter in his minutes the *decision* which he may make concerning the sufficiency of the proof or validity of any will which may be offered him for probate, and I think it quite clear that the admission of the will in question to probate, was a *decision* or determination of this court upon the proofs submitted.

In *Campbell v. Logan*, (2 *Bradf.*, 90), after a very elaborate and learned discussion of the question, Surrogate BRADFORD held that the power to revoke, open or alter the decrees of the Surrogate Court, was essential to the administration of justice, and a necessary incident to the exclusive jurisdiction of the Surrogate over all matters of the probate of wills; and this power was claimed independent of the provisions of the statute prescribing the conclusive character of the probate of wills of personal property.

In *Pew v. Hastings* (1 *Barb. Ch.*, 452), the chancellor

* Reversing 6 *Lans.*, 1.

BAILEY v. STEWART.

held that the Surrogate had the power to open a decree taken by default, and in consequence of mistake, or accident, and that the provisions of the *Revised Statutes* "that no Surrogate shall under pretext of incidental power, or constructive authority, exercise any jurisdiction whatever not expressly given" by same statute of this state, (2 *Revised Statutes*, 221, § 1) having been repealed by the Act of 1837, page 536, sec. 71, it had restored the incidental powers inherent in that court; and in *Proctor v. Wanmaker*, (1 *Barb. Ch.*, 302.) it is held that the Surrogate has power to revoke letters of administration which have been irregularly and improperly obtained upon false suggestion of matter of fact without due notice to the party rightfully entitled to administration, independently of the statute of 1837.

In *Dobke v. McClaran* (41 *Barb.*, 491), it was held that the Legislature, by repealing the provisions of the *Revised Statutes*, prohibiting the exercise of any jurisdiction, not expressly given by the statute above referred to, intended that the Surrogate should have incidental power to open, or correct a decree made through fraud, or mistake as to a material fact, and Mr. Justice SUTHERLAND said at page 494, "I think such power may be necessary to prevent the greatest injustice," and Mr. Justice LEONARD, at the same page, said, "the power of revoking letters of administration, irregularly and improperly obtained, or upon false suggestions, has been proved on sufficient authority."

By parity of reason, if a probate were refused by mistake, or misapprehension, the decree should be opened, and the application reheard; it is within the incidental power referred to in the cases cited.

In *Sipperly v. Baucus* (24 *N.Y.*, 46), it was held that the effect of the repeal by the act 1837, chapter 460, sec. 71 above cited of the restrictive clause, in respect to the

jurisdiction of Surrogate's Courts, (2 *Revised Statutes*, 221, sec. 1,) is to restore to such courts the incidental powers possessed by them previous to the Revised Statutes, citing the authorities which are above referred to.

In *Skidmore v. Davies* (10 *Paige*, 316), it was held that the remedy of a party aggrieved by an irregular *ex parte* order made by the Surrogate, is to apply to the Surrogate to vacate, or set aside the order, and not by an appeal to the Chancellor.

The authority above cited in the *Kellum Will* (50 N. Y., 298), does not sustain the principle urged by counsel for the executors and executrix. There is no intimation in the decisions that the Surrogate has not the power to open a decree of probate of a will of real estate. The learned Judge in that case holds that the effect of a probate of a will of personal property, and of real estate differs; as to *real estate*, it is not conclusive either as to the validity, or due execution of the will; but as to the probate of a will of personal property it is conclusive, until the same be reversed on appeal, or revoked by the Surrogate in the manner provided by the statute, or the will be declared void, by a competent tribunal. The Judge also states the reason why, in the one case, the statute provides for the making of allegations within one year, while there is no provision of that kind respecting a will of real estate; but there is no intimation in the opinion of that court, that the Surrogate has not the power as an incident to his office, to open, vacate, or modify a will of either kind.

The authorities above considered leave no reasonable doubt in my mind, that this court has the power, in a proper case, to set aside, open, vacate, or modify the order, or decree, admitting a will of real estate to probate.

But if any such doubt existed prior to the Act of 1870, chapter 359, it seems to be fully removed by the lan-

BAILEY T. STEWART.

guage of the 1st section of that act made applicable to the Surrogate's Court of the county of New York, the latter clause of which reads as follows: "And the said Surrogate shall have the same power to set aside, open, vacate, or modify orders or decrees of the said court, as is exercised by courts of record of general jurisdiction." The terms and scope of this power are certainly very ample; that courts of general jurisdiction have power to set aside, open, vacate, or modify the orders or decrees is pre-supposed by the section in question and it is a power which is generally exercised for the purpose of correcting mistakes, and relieving against fraud, &c. And I understand the power conferred by the section last named to be equal to that exercised by a court of equity, on a bill filed for the purpose of obtaining relief against a judgment, or decree, for fraud or mistake.

In the *matter of Brick*, after a most exhaustive discussion of the question, chief justice DALY (15 *Abb. Pr.* 12), at page 36, concludes as follows: "That the courts may undo, what has been done, through fraud, or upon the supposition that they had jurisdiction, or upon the assumption that the party was dead, who is living, or that there was no will—or they may open decrees taken by default, or correct mistakes, the result of oversight, or accident. These are all powers existing of necessity, and indispensable to the administration of justice, under which may be embraced any other exercise of jurisdiction of a like nature or character." And this decision, be it remembered, was made prior to the Act of 1870.

Having reached the conclusion that I have the power to entertain the petition in this matter, it becomes necessary to determine whether the petition may invoke that power as a legal *right*, or whether the petitioner

BAILEY v. STEWART.

addresses himself to the discretion of the court, which discretion should be exercised with a just regard to the interests of the respective parties.

From an examination of the various authorities on the subject, and of the Act of 1870, I am persuaded that this petition should be regarded as an appeal to the discretion of this court, and not as a matter of absolute right.

By the term "discretion" is not meant such discretion as forbids a review in cases where that discretion shall be improperly or unlawfully exercised, but such a discretion as would justify the granting, or denial, of the application, according to the circumstances and equity of the case.

If it should appear as a part of the record, that the decree sought to be vacated, was absolutely void, it seems to me that the opening or setting aside of such decree would be a matter of discretion, the refusal of which would be justifiable, and would not be reversed on appeal, while in a clear case of equity, uncontradicted though addressed to the discretion of the court, if denied, it would be reversed on appeal.

It is objected by the petitioner's counsel that the Surrogate in this matter, obtained no jurisdiction for the purpose of admitting the will in question to probate, because of the alleged existence of heirs at law not cited, and that therefore the decree is absolutely void.

Without at present passing upon the question, whether a decree absolutely void is, for any purpose, an obstruction to the enforcement of the alleged rights of the petitioner, it is sufficient to say that on the proof furnished to the Surrogate in this case, he obtained jurisdiction over the probate of the will, and over the only persons entitled, upon that proof, to be heard.

It is quite clear to my mind that where a petition

BAILEY T. STEWART.

shows a case conferring jurisdiction, the Surrogate has authority to act in the premises, and it is not true to say that the subsequent discovery of persons, who were entitled to an interest in the estate as heirs, would render the decree void. Such a state of facts would only render, the decree inoperative, as to the person so discovered to be entitled.

Suppose, as an illustration, that a testator should die leaving, as is supposed, but three children, and upon that assumption, the will should be probated, and many years thereafter, it should turn out that a fourth child supposed to be dead, was living, can it be seriously pretended that such a discovery would render a probate void? If so, most disastrous consequences might result to the estate and to those who had become possessed of it.

The most that could be said in such a case would be that the probate might be avoided, so far as the interests of the heir not cited is concerned, and that the probate for that purpose would be set aside, if at all, on appeal to the discretion of the Surrogate.

Indeed, is it not the fact that the counsel for the petitioner acquiesces in the continuance of the probate as far as the will relates to personal property, in his application to this court to open the same as a will of real estate, and that they recognize the fact that the Surrogate had jurisdiction to probate the will in question? For if they regarded the alleged probate as void for want of jurisdiction, it is quite clear they need no intervention of this court to relieve them of the effect of a void decree.

If, as I must assume for the purpose of this proceeding, the petitioner is an heir, it cannot be denied that, by the settled practice of this court, he was entitled to an opportunity to resist the probate of the will in question, and that if his relation to the testator had been known, and recognized before the probate of the will, he would

BAILEY T. STEWART.

have been included in the citation, and afforded the opportunity of being present at the probate—and if he had been next of kin, so as to have entitled him, but for the will, to a share of the personal property, there would be no doubt of his right to an opening of the probate, so far as the instrument propounded was a will of personal property is concerned.

The cases of *The public administrator v. Peters*, 1 *Bradf.*, 100; *Skidmore v. Davies*, 10 *Paige*, 316; *Vreedenburg v. Calf*, 9 *Paige*, 127; *Bloom v. Burdick*, 1 *Hill*, 130; *Corwin v. Merritt*, 3 *Barb.*, 341; *Shelden v. Wright*, 5 *N. Y.*, 497; *Sibley v. Waffle*, 16 *N. Y.*, 180, cited by the counsel for the petitioner, seem to sustain his right to such an opening of the decree; but it is claimed on the part of the counsel for the executors and executrix, that as this application is addressed to the discretion of the court, its exercise may well be denied, because of the difference in the effect of the probate of a will relating to personal property, and one relating to real estate; and this brings me to the consideration of the final and more important question involved in this proceeding.

In *Harrison v. Ridley* (2d *Comyns Reports*, 589,) it was held that a bill of revivor did not lie by an assignee.

The assignee in that case filed a bill of revivor as assignee of one Beaumont who had been discharged as an insolvent debtor. Beaumont had exhibited his bill to be relieved against securities entered into by him to the defendant, and it was held that he had no such interest as to entitle him to sustain the bill.

In *Reid v. Vanderheyden* (5 *Cow.*, 719), WOODWORTH, justice, at page 733, uses this language: "It is an elementary principle recognized in all the books, that a person having no interest in the subject of dispute cannot be a party litigant; and I am not aware of a

BAILEY v. STEWART.

single exception in any one of the courts according to the course of common, civil or canon law. To show the nature and universality of the rule, and illustrate and enforce it, we need only go to the doctrines of a court of equity—where the greatest possible latitude as to parties is indulged. There, not only must the original parties have an interest, but that interest is followed in all its changes * * * * even in cases of changes of bankruptcy or insolvency a bill must be filed in the nature of a bill of revivor,”—citing *Harrison v. Ridley*, (*supra*.)

Under the head of rescission, cancellation and delivering up of an agreement, ex-judge WILLARD, in his *Equity Jurisprudence* (at page 304) says: “These classes are all referable to one common head of equity jurisdiction, the prevention of an injury that might otherwise prove irreparable, but it seems to be settled that a court of equity will not order an instrument to be delivered up and cancelled which upon its face is plainly illegal, and void;” nor a deed of lands, when it is certain from its nature and contents, it can throw no cloud upon the title of the plaintiff, nor a negotiable instrument that has been merged in a judgment; so of all kindred cases in which the plaintiff is exposed to no hazard from future litigation, and where it is certain that in no action founded on the instrument can recovery be had against him; and at page 307 the same learned author says: “It is quite clear that the cases on this subject, cannot all be reconciled, except by the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate, and that the resort to equity to be sustained, must be expedient either because the instrument is liable to abuse from its negotiable nature or because the defence arising on its face may be

BAILEY C. STEWART.

difficult or uncertain at law, or from some other special circumstances, peculiar to the case and rendering a resort to equity highly proper, and clear of all suspicion of any design to promote expense and litigation. If, however, the defect appears on the bond itself, the interference of the court will still depend on a question of expediency and not on a question of jurisdiction."

In *Tripp v. Cook* (26 *Wend.*, 143), Senator VERPLANCK, after discussing the judicial meaning of discretion, at page 152, uses this significant language: "Judicial discretion is a phrase of great latitude, but it never means the arbitrary will of the Judge—it is always (as Chief Justice Marshall defined it), legal discretion, to be exercised in discerning the course prescribed by law: when that is discovered it is the duty of courts to follow it—it is to be exercised not to give effect to the will of the judge but to that of the law."

Such discretion may be exercised in relation to the convenience of courts, suitors, and the expedition of business, or upon the evidence as to some interlocutory matters, on which one tribunal could not well prescribe to or even advise another. A definition of judicial discretion seems to be necessary in this case, in order to determine the scope of the inquiry as to the judicious exercise of such discretion.

The right exercise of that discretion in this case, it seems to me, involves the rights and remedies sought by the petitioner if granted, and the effect of such relief upon the adverse party; and it is a judicial balancing of those rights, which constitute a right exercise of such discretion.

I now come to the consideration of the advantages which would enure to the petitioner, and the disadvantages and dangers which would be imposed upon the estate in question by an opening of the probate.

BAILEY v. STEWART.

By chapter 238, of the Laws of 1853, it is provided that the validity of any actual, or alleged devise by a will of real estate, may be determined by the Supreme Court, the same as the validity of any deed, &c., and that any heir or heirs, claiming lands, tenements, or hereditaments, by descent from an ancestor, who died holding, and being in possession of the same, may prosecute for the partition thereof, notwithstanding any apparent devise by such ancestor, and any possession held under the same devise, provided that such heir or heirs shall allege and establish in the same suit, action, or proceeding, that such apparent devise is void.

In the matter of the *Kellum Will* (50 N. Y., 298,) it is held that the probate of a will of real estate is not conclusive either as to the validity, or due execution of the will.

By section 748, of the Laws of 1869, the record of a will given in evidence is made effectual in all cases as an original will, if produced, and proved, and may in like manner be repelled by contradictory proof.

In *Woodhull v. Ramsey* (3 Johns. Cases, 234,) the probate of a will is held not conclusive upon the heir, and that the record is only *prima facie* evidence.

Under these statutes and authorities cited, there seems to be no doubt, that, *at most*, the probate of the will in question is only *prima facie* evidence, and that in any proceeding by the alleged heirs at law, of the testator, to enforce their alleged rights, in respect of the real estate, the force of that probate may be attacked.

It is entirely clear that this court has no power to grant to the petitioners any affirmative relief by which their rights to the real estate in question may be determined.

If the probate should be opened, would the petitioner be in any better position to enforce his alleged claim to

BAILEY C. STEWART.

the real estate left by the testator, than he would if the probate remained? He must take proceedings in another court, by ejectment or partition, and must there show, that he is an heir entitled; and when he has shown that, the production of the probate would not be even *prima facie* evidence against his right, unless the party interposing the probate as an obstacle to the petitioner's claim, could show affirmatively that the petitioner was duly cited on the probate, and if he *were* so cited, under well settled authorities in such cases, he could attack the validity of the will, as though it were never proved.

Again, suppose the will had not been proved, and the heir should bring ejectment, he would have to produce some evidence of his title, and the devisees in the will would be compelled to produce the will, with sufficient evidence of its due execution; so that in any event, the opening of the decree would not relieve the petitioner from any embarrassment in respect to the proof of his title, but it would add somewhat to the burthen of the devisee in proving the execution of the will.

It was urged by counsel for the petitioner that under the statute of 1870, already cited, there was no authority for the claimant to raise the question as to the absence of jurisdiction of the Surrogate to probate the will, except by an application to the court to open or vacate the probate, because he was not a party to the proceedings and would therefore have no standing to appeal.

On a careful consideration of this objection, I am inclined to the opinion that any objection to jurisdiction, or otherwise in respect to the probate of the will in question, or its validity, or due execution, may be raised, in any proceeding instituted for the purpose of enforcing a claim to the real estate, and that the statute of 1870 would not effect a person who was not made a party to the probate.

BAILEY C. STEWART.

Mr. Justice RAPALLO in the *Kellum Will* (above cited) uses this language: "as to the real estate, the probate is not conclusive, either as to the validity, or due execution, of the will; this question may be litigated whenever the rights to real estate claimed under the will are controverted."

It is to my mind entirely clear that in every proceeding, and in all stages of an action, even on appeal, the question of jurisdiction may be raised, and must be met. (*Ex parte Livingston*, 34 N. Y., 555; *Brookman v. Hamill*, 43 N. Y., 554; *Jones v. The Norwich and New York Transportation Company*, 50 Barb., 193.)

On the argument, it was urged by counsel for the executors and executrix, that the moving papers did not show probable ground for denial of probate of the will in question, if opened, because of the improbability of Mr. Hilton influencing Mr. Stewart to devise his real estate to his wife, who would seem to have the best right to it, while Mr. Hilton, as he was not interested in the real estate, appears to have had no motive for the exercise of such influence.

But in this case, it would be unprecedented, as well as unjust, for this court, in passing on a preliminary motion to open a decree for the purpose of enabling the petitioner to adduce evidence not by affidavits, but by competent proofs, to determine the ultimate merits of the case, nor is it proper that I should express on this preliminary proceeding any opinion upon the subject of such an alleged improbability. Besides, as the will was made at the same time in respect to both kinds of property, and by the same testator, if undue influence could be proved, it might be quite difficult to determine that the influence did not affect the will in all its points.

Some observation and experience have led me to deplore the growing irreverent disregard by heirs at law

BAILEY v. STEWART.

and next of kin of the last wills and testaments of those who by honest industry and prudence, may have acquired a moderate competence, or an abundance, and who pursuant to law have presumed to bestow their pittance or fortune, according to their free will, resulting in the dissipation of fortunes as well as of family concord, by dishonorable and unseemly legal contests, until the performance of a solemn duty has become an occasion of anxiety, lest its attempted performance should prove seriously detrimental rather than beneficial to those who are just objects of testamentary bounty.

These evils are more felt, and deprecated by those of moderate means than by the wealthy, and in a very great majority of cases, where wills are executed, the amounts devised or bequeathed are small, and yet upon such meagre bounties depend the sustenance and comfort of an affectionate and loved help-meet and the education of beloved and dutiful offspring, the solace of venerated parents, or perhaps, aid and encouragement of some worthy christian charity or public benefaction.

The interference with the deliberate and intelligent disposition of estates should not be encouraged, and particularly should the practice of rewarding experiments to overthrow last wills and testaments, by allowing contestants to receive from the estates compensation for their unwarranted assault upon them, be discouraged, and contestants, in case of failure, should be held to a rigid rule of good faith before they receive an allowance from the estate.

The questions involved in this proceeding are important, delicate and not easy of solution, because the authorities are very few treating upon them, but if I err in my conclusions, there is a ready and convenient mode of review by which such error can be corrected.

While the law should be administered with care, alike

NICHOLL v. LARKIN.

in cases involving small and large amounts, and with absolute impartiality, yet in a case of the unprecedented magnitude of this proceeding, likely to affect such vast interests, and challenge public attention, it has seemed to me that extraordinary care and diligence should be observed in passing upon the questions involved.

If I am right in my estimate of the effect upon the alleged rights of the petitioner, and those whom he assumes to represent, in the opening of the probate, it seems to me that it would be an unwise and unjust exercise of the judicial discretion of this court to open the probate, where no practical and substantial benefit can enure to them, while it would be likely to throw discredit upon the tenure of the real estate devised to Mrs. Stewart, and paralyse the great enterprises now in progress.

For the reasons above stated, the petition should be dismissed.

Order accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE,—MAY, 1876.

NICHOLL v. LARKIN.

In the matter of the Estate of THOMAS LARKIN, deceased.

Against a claim to compensation for personal services, rendered to the decedent during a number of years before his death, the statute of limitations will be deemed to have commenced to run from the completion of yearly or other periods of service, unless there is sufficient evidence of the decedent's agreement to make provision for the claimant's compensation by a disposition of his property at death*

Evidence that the decedent in speaking of compensating the claimant, said merely to a third person that he "would not forget the claimant

*See *Moore v. Moore*, (3 Abb. Ct. App., Dec., 303,) *Robinson v. Raynor*, (28 N. Y., 494; rev'g 36 Barb., 128.)

NICHOLL v. LARKIN.

in case any thing happened to him,—in case of his death”—is not sufficient to support a finding of a referee, that the decedent agreed with the claimant to make compensation at his death.

Upon such evidence, with other evidence going only to show a general hiring by the year, the law implies an agreement to pay yearly, and the cause of action is deemed to have accrued at the expiration of each year.

THIS was a claim for payment of the creditor Nicholl, for services rendered to the deceased, Thomas Larkin, who died in September, 1874.

The account or claim presented bore date July 1st, 1875, and was for services by the year, alleged to have been rendered, by the claimant for the intestate, during the years 1859 to 1868. The report of the referee or auditor to whom the matter was referred found that the services were rendered at the request of the intestate, and were worth the sum of one hundred dollars per year.

One witness, O'Connor, testified as follows:

Qy. “Did he (meaning the intestate) say anything to you about compensating Mr. Nicholl” (the Claimant)?

Ans. He said to me at one time, that he would not forget Mr. Nicholl “in case anything happened to him—in case of his death.”

J. B. AITKEN, *for claimant.*

L. H. ARNOLD, Jr., *for public administrator.*

THE SURROGATE.—I have examined the report of the referee and auditor in this matter, and the testimony taken before him; and while it is with great reluctance that I dissent from the conclusions reached by a referee, of so large an experience in proceedings of this character, yet it becomes my obvious duty, as I understand the law of this case, to send the matter back for reconsideration, and such additional testimony as the parties may desire to give.

The testimony of O'Connor (above stated), is the

NICHOLL v. LARKIN.

only testimony that tends to show an intention on the part of the intestate to make any provision for the claimant's compensation, by a disposition of his property, and this does not appear to have been said in the presence of the claimant, nor can it, in my opinion, be regarded as an agreement to do so, but the mere expression of his intention to a third person.

Most of the other witnesses testify to having heard the intestate say at different times that he intended to compensate Mr. Nicholl for his services, while others testify that they heard him say to the claimant, that he would compensate him.

While the testimony is quite indefinite and unsatisfactory as to the extent of the services rendered, yet upon the question of fact I should be disinclined to interfere with the report.

If any hiring, and agreement to pay, can be implied from the facts proved in this case, it must be implied to have been a hiring from year to year, and the cause of action for the claim accrued at the expiration of each year.

I am aware that it has been held that where there is an agreement to compensate a person for services by will, or at the death of the employer, the Statute of Limitations does not begin to run until after the death (*Quackenbush v. Ehle*, 5 Barb., 469), but I think that taking the evidence together in this matter, no such agreement can be found.

In *Davis v. Gorton* (16 N. Y., 255), Mr. Justice JOHNSON says: "the Referees have not found that these services were performed upon contract that they should be paid for after Moore's death, in case he did not provide by will for compensation of the parties who rendered them, but they are placed on the ground of services to be paid for, at their value, without any express agreement as to the time or measure of compensation, or term

BURK'S WILL.

of employment. * * * Indefinite hiring is taken to be a hiring from year to year, payable at some time."

In that case, it was held that the Statute of Limitations began to run as to each year's services at the end of the year.

In this case, it appears by the evidence, the claim, and the report, that the last services were rendered the 31st day of December, 1868, and that most of the services, for which compensation has been allowed by the referee, were performed more than six years before the intestate's death, and it also appears that the intestate died in September, 1874, at which time the claim for all services except for the last year, was barred by the Statute of Limitations.

The motion to confirm the report of the referee, and auditor, must be denied, and the matter referred back to the referee and auditor for reconsideration, with leave to take such additional testimony, on behalf of the respective parties as shall be offered.

Order accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—MAY, 1876.

BURK'S WILL.

In the matter of the Probate of the last Will and Testament of ELLEN BURKE, deceased.

The publication on the part of a testator need not be in express words. It is sufficiently shown by evidence that in the hearing of both witnesses, the testatrix asked the witness to draw her last will and testament, and when he had done so, and had read it aloud to her, she approved and signed it.

To constitute undue influence which will invalidate a testamentary act, there must be the control of another will, over that of the testator.

BURK'S WILL.

The fact that there is no attesting clause to a will does not affect its validity.

Where the testatrix insisted on inserting in her will bequests to the draftsman's children, notwithstanding his suggestion that they had no claim, and made no provision for her husband, and none for her own son until asked by a by-stander if she would not,—*Held*, that as she had long been separated from her husband, and her son had been long absent and unheard from, the circumstances did not show impaired mind and subjection to undue influence.

THE contestants objected to the probate, particularly because ;—1. Of alleged undue influence exercised by the two subscribing witnesses to the will ; 2. The incapacity of the testatrix ; and 3. The following defects urged in respect to the mode of execution. *First* : That the testatrix did not subscribe the will. *Second* : That she did not declare it to be her will. *Third* : That she did not request the witnesses to subscribe their names as such.

As evidence of want of capacity, the proof showed, that the testatrix was suffering from the effects of poison which affected her throat, and rendered her speech somewhat difficult to be understood, and that the poison affected her eyelids, so as to prevent her from keeping her eyes open.

It was also alleged on the part of the contestants, that certain bequests to the children of the two subscribing witnesses, should excite suspicion as to the undue influence exercised by them over her mind, during the period of her final illness.

It was also urged that the terms of the will should excite a like suspicion.

The proof showed that, apprehending that she was about to die, the testatrix sent Mrs. Cusick, an attendant upon her, to Mr. Dillon, the other subscribing witness, to come and fix up her affairs.

That Mr. Dillon called at such request, and was told by her that she wanted him to settle her affairs. He objected, and suggested the procuring of a lawyer,

BURK'S WILL.

but she declined, and said; "We can fix it." Writing materials were procured, and he wrote down, as she said, and under her directions; that is, he wrote each clause of the will and read it over to her, and she said it was right.

That after he had written it in full, he read it to her again; that he didn't think she could write, and that in signing the instrument she held the pen, he holding her hand, signing the name.

Dillon testified that after she had signed the instrument, she did not state what the instrument was, but asked Mrs. Cusick, and himself, to sign it, which they did, in the presence of the testatrix, and of each other, that after he had written the residuary clause of the will, Mrs. Cusick asked her if she wasn't going to do something for her, testatrix's, son Johnny—that she hesitated awhile, then suggested that she would give him \$450, but prior to that the testatrix had not suggested his name.

It appeared also that the testatrix had a husband living, but that they had been separated for several years.

Dillon also testified that the testatrix seemed to be in a good deal of distress; that she had difficulty in keeping her eyes open, and that her eyelids had to be held open, to enable her to see, but that she was in strong physical health, and clear in her understanding, and that when the instrument was executed, he was not aware that the law required any declaration that the instrument was her last will and testament.

The testimony of Mrs. Cusick, the other subscribing witness, agreed substantially with the testimony of Dillon above recited, except that she testified that the testatrix asked Dillon to write her will for her, and when he had gotten through with writing the will, she said that would do.

BURK'S WILL.

Both witnesses testified that when the testatrix requested Dillon to write the bequest to his children, Dillon objected, and said he had no claim, but she insisted, and he drew the provision accordingly.

JOHN P. COWLES, *for proponent*,

SULLIVAN, KOBBE, & FOWLER, *for contestants*.

THE SURROGATE.—Though the will in this case is very informal, yet it seems to me, it has been executed in substantial conformity to the requirements of the statute.

In *Campbell v. Logan* (2 *Bradf.*, 98,) it is substantially held that where a testatrix desired a former will to be altered, and a new will was drawn, and it was read to the testatrix and was signed by her, she holding the pen, and another party guiding it for her; she stating that the writing was sufficient, and asking the witnesses to sign the writing, though the witnesses could not remember that she declared it to be her last will, but only said, it was all right; such evidence established a substantial declaration by the decedent of the testamentary character of the instrument at the time of its execution. (See also *Van Hanswyck v. Wiese*, 44 *Barb.*, 495.)

In *Moore v. Moore* (*id.* at page 265), Surrogate BRADFORD said: "No particular form is requisite; all that the law requires is, that the testator shall communicate to the witnesses that it is his will, and he desires them to attest it; this can be done by reading, and other acts performed by a third person, provided an intelligent assent on the part of the testator be shown. Indeed, not a word of necessity need be said; a deaf mute might go through all the ceremony by means of a written communication."

In *Vaughan v. Burford*, (3 *Bradf.*, 78), the same learned judge, at page 83, says, "reading aloud before he signed,

BURK'S WILL.

followed by the act of signature, constituted a testamentary declaration."

And in *Carle v. Underhill*, (3 *Bradf.*, 105,) the following language is used: "when the testator in the presence of the subscribing witnesses dictates the provisions of the instrument—reads it aloud after it is drawn—signs it, and requests them to give it their attestation, the substance of what the statute requires is performed; that is, he manifests it, and makes public and open, the nature of the act."

On the question of undue influence, in *Blanchard v. Nestle*, (3 *Denio*, 37), Judge JEWETT says: "a person has a right by fair argument or persuasion to induce another to make a will, and even to make it in his own favor. The procuring a will to be made by such means is nothing against its validity." In *Gardiner v. Gardiner* (34 *N. Y.*, 155), Mr. Justice DAVIES, at page 162, uses this language: "undue influence must not be such as arises from the influences of gratitude, affection, or esteem, but it must be the control of another will over that of the testator, whose faculties have been so impaired, as to submit to that control, so that he has ceased to be a free agent, and has quite succumbed to the power of the controlling will."

The fact that there is no attesting clause to the instrument in question does not affect the validity of the will, as such clause is a part of the will, and is not required as a part of its due execution by any law. (*Jackson v. Jackson*, 39 *N. Y.*, 153).

It is true that the proof in this case shows that some of the provisions of the will were suggested by the subscribing witnesses, but I think there is an entire absence of proof to show the acquiescence of the testatrix in the suggestions, was not voluntary; indeed, her persistence in making provision for the children of Dillon

 CRAM v. CRAM.

affords convincing evidence of her free will in that respect, and while her forgetfulness of her son's claims upon her bounty may militate somewhat against her clearness of mind, yet it is quite evident, that the provision in behalf of her son, was neither unduly influenced or coerced, and the fact that her son had been long away from home, and all trace of him apparently lost, forms some excuse for her non-remembrance of him; and the fact of her living separate from her husband for many years seems to me a sufficient explanation of his not being remembered in the will.

From the best consideration I have been enabled to give to the evidence in this case, and the questions of law involved, I am of the opinion that the will should be admitted to probate.

Let a decree be entered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—MAY, 1876.

CRAM v. CRAM.

In the matter of the Estate of GEORGE C. CRAM, deceased.

Expenditures incurred for the benefit of the body of the estate, such as expenses of unproductive property, and for extinguishing a claim of dower,—*Held*, not chargeable against income.

Annual rests, and full commissions thereon, are now allowed, not only, as formerly, when such rests are made by order of the court for the purpose of charging the executor or administrator with interest, but also in all cases where an actual annual accounting before the Surrogate is had, under the requirements of a rule of court or a statute.

But full commissions cannot be allowed on the voluntary rendering of an account for the purpose of securing full commissions.

On an accounting by testamentary trustees, their commissions, when allowed, are at the rate of 5, 2½ and 1 per cent., although the like rates were previously allowed to them on accounting as executors. *

* Compare *Matter of Pike*, *post*, p. 255; and see 13 *Abb. Pr. N. S.* 361, *note*.

CRAM v. CRAM.

THIS was a proceeding for a final settlement of accounts of the executors, etc., of George C. Cram, deceased.

The objections to the accounts rendered by the executors were interposed by the widow, and embraced substantially but two subjects :

First, as to certain expenses amounting to \$1,750 charged against the income of the estate, whereas it was alleged that the amount was made up for expenses on certain property, unproductive, in Chicago, and for the purpose of extinguishing claims for dower thereon, and should therefore be charged to the body of the estate :

Second, as to a charge by the executors of full commissions on annual rests, it being objected that annual rests are not allowable for the purpose of charging full commissions, but are confined to cases where annual rests are made by order of the court for the purpose of charging the executor with interest.

ROBINSON & SCRIBNER, *for the Executors.*

BEACH & BROWN, *for the Guardian.*

THE SURROGATE.—As to the *first objection*, I think it is well taken. The expenditures referred to were incurred for the benefit of the body of the estate, and cannot with propriety be charged to the income.

I have given very careful attention to the question, as to the authority of the executors to make annual rests, and charge full commissions thereon. The earlier decisions seem to be quite uniform in holding that such commissions are only chargeable in cases where annual rests are made under the order of the Court, for the purpose of charging executors with interest. (*Van Der Heyden v. Van Der Heyden*, 2 Paige, 287; *Matter of Bank of Niagara*, 6 Id., 213; *Hosack v. Rogers*, 9 Id., 461; *Bennett v. Chapin*, 3 Sandf., 673; *Fisher v. Fisher*, 1 Bradf., 335.)

But the more recent decisions seem to allow annual

GRAM v. GRAM.

rests, and full commissions thereon, in all cases where such accounting is made under the requirements of a rule of court, or by the provisions of the statute. (*Morgan v. Hannas*, 13 Abb. Pr., N. S., 361; *Matter of Pirnie*, 1 Tucker, 119). This latter case seems to be based upon chapter 115, of the laws of 1866, but the report fails to state whether there was a final accounting before the Surrogate, at the times when annual rests were made, or whether an annual account was rendered to the Surrogate, under the requirements of the statute, or whether the accounting in that case was merely a formal statement of the account struck upon the books of the trustee, without any rendering of it under the statute to the Surrogate, and if the latter, then I think the language of that decision is quite too broad.

I think the fair construction of the Act in question is to allow full commissions to trustees on all accountings before the Surrogate required by law, and that neither the Act, nor any of the authorities justify the rendering of an account voluntarily, for the purpose of securing full commissions.

As to the objection made by the learned counsel for the widow, that only one per cent. commissions can be allowed on this accounting by the trustees, because 5 and 2½ and 1 per cent. was allowed to them as executors on their accounting in 1871, I think it is not well taken.

This accounting is such an accounting before the Surrogate, as was contemplated by the terms of chapter 115, of the Laws of 1866, and under its provisions the allowance to trustees as compensation for their services by way of commission is provided for: and I think five, two and one half and one per cent. under the statute allowable to the trustees on this accounting, without annual rests.

Décree accordingly.

EAGER v. ROBERTS.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JUNE, 1876.

EAGER v. ROBERTS.

In the matter of the Estate of JAMES EAGER, deceased.

Under 2 R. S., 86, § 23, which forbids an executor neglecting to join in making an inventory, to interfere thereafter with the estate,—and 2 R. S., 93, § 58, which makes the compensation of an executor dependent on the sums received and paid out,—no commissions can be allowed to an executor who refused to join in the inventory because it was untruthful, and thereafter took no part in the administration.

An executor who is obstructed by his co-executors in the performance of his duty to make a true inventory, should take proceedings to enforce the making of it.

The Act of 1863, which authorises the allowance of separate commissions to several executors where the estate exceeds \$100,000,—does not apply in favor of an executor who has not filed an inventory nor performed any duty.

Such an executor, if he has no interest in any unsatisfied bequest, has no standing in court to object to the correctness of the account of his co-executors.

THIS proceeding was a final accounting of the executors, etc., of James Eagar, deceased.

There were three executors; and the account was rendered by two of them as “active executors,” so called, and the question submitted related to the right of Mr. Roberts, a third executor, to commissions.

The testator died in August, 1874, leaving a will making several specific bequests, with a residuary clause in behalf of his brother, Jonathan H. Eager, and Joseph Eager, and his sister, Lucy H. Morgan; and nominating his brothers, Jonathan H. and Joseph, and John F. Roberts, executors.

It appeared that the principal portion of the testator's estate consisted of his interest in the firm composed of himself, and his brother Joseph Eager, engaged in the liquor business. Soon after the executors had received

EAGER v. ROBERTS.

letters testamentary, they proceeded to make an inventory, the executor, Roberts, having notice of the time, and place, but he failed to attend; and after the inventory had been made, he alleged that it was insufficient, and did not embrace the whole property, and he refused to sign and verify the inventory, but urged upon his co-executor, Joseph Eager, to have a disinterested book-keeper to examine into the affairs of the firm for the purpose of ascertaining the property of the testator.

The other executors signed, verified, and filed the inventory, which was subsequently increased by the recovery of a certain note, which was supposed, at the time the inventory was made, to be uncollectable.

It also appeared that soon after the inventory was made, Mr. Roberts had a communication with Jonathan H. Eager, and Mrs. Morgan who resided out of the city, with the view of procuring them to take proceedings to ascertain the real amount of testator's property, which, however, ultimately failed, by their selling out their interest in the residuary estate to Joseph Eager, for the sum of \$15,000 each.

It also appeared that Jonathan H. and Joseph took general and active charge of the estate, disposed of the same, and paid the specific legacies pursuant to the provisions of the will, and that no money, or property ever came into the possession of, or was paid out by, the executor, Roberts, and that substantially he took no active charge of the estate, and was only cited on the final accounting.

On the final accounting, numerous objections to the account were filed by Roberts; but it appearing that Joseph Eager was entitled to the whole residuary estate under the will, and by the purchase of the shares of his brother and sister, the question substantially submitted on this hearing was—whether Mr. Roberts was

EAGER v. ROBERTS.

entitled to commissions as executor, and if so, he asked for the appointment of an auditor to determine the amount of the estate and his commissions.

In behalf of Mr. Roberts, it was urged that he was excluded from the performance of his duty as executor—that he could not in conscience sign, and verify, the inventory, because he believed that it did not contain a full statement of the testator's estate, and that these facts offered sufficient excuse for his not filing an inventory, or rendering an account of his proceedings in respect of the estate.

DEWITT & JOHNSON, *for the Executors.*

JOHN F. ROBERTS, *in person.*

THE SURROGATE.—By section 23 of 2 *Revised Statutes*, 88, it is provided that any one or more of the executors or administrators named in any letters, on the neglect of the others, may return an inventory, and those so neglecting shall not thereafter interfere with the administration, or have any power over the personal estate of the deceased, but the executor or administrator so returning an inventory, shall have the whole administration, until the delinquent return and verify an inventory agreeably to the provisions of this article.

By section 58 (2 *Statutes at Large* 95,) it is provided that on the settlement of an account of an executor, &c., the Surrogate shall allow to him for his services, for receiving, and paying out all sums of money, &c.

Under these provisions of the statute it seems to me that no allowance of commissions for a delinquent executor who has not accounted should be made; for I am not prepared to hold that because an executor is obstructed in the performance of his duty as such, he should abandon his duty altogether, nor is it to be tolerated, that an executor shall be compensated for duties obviously neglected.

EAGER v. ROBERTS.

Under the circumstances of this case, if Mr. Roberts was obstructed as he sets forth in his affidavit, and he believed that the inventory filed by the other co-executors was false, he was vested with full power to take proceedings and enforce a correct and full inventory, and for that purpose might have invoked the authority of the Surrogate; and if that inventory should not be acquiesced in, signed, or verified by his co-executors, nevertheless it would have been an inventory of the estate, and his duty as executor have been performed.

The same may be said in respect to any other duty of Mr. Roberts as executor, and it is unreasonable to suppose that he performed his duty as such executor, by merely protesting against what was done by his associates. If they neglected their duty to the estate, it was his duty to enforce the lawful performance of it on their part, as well as to perform it himself; and omitting to do it, he is clearly a delinquent executor.

It is urged on behalf of Mr. Roberts that the statute of 1863 authorizes an allowance to him of the commissions irrespective of what he has done, without regard to the services rendered by him, and he cites the case of *Vannest* (1 *Tucker*, 130).

The language of that case is quite too broad, for the statute itself provides that each and every of such executors in cases where estates amount to more than \$100,000, shall be entitled to, and shall be allowed, the full amount of compensation, to which he would have been entitled by the provisions of that Act, if he had been sole executor or administrator.

If he had been sole executor, and had not received or paid out any of the sums of money belonging to the estate, but had neglected to perform his duty as executor, it is quite clear he would not have been entitled to commissions.

MATTER OF WARD.

His failure to present any account of the proceedings, or join in the accounting, and inasmuch as he neither received nor disbursed the property of the estate, nor took any proceedings in its distribution, or payment of legacies, he has forfeited all right to commissions.

As Mr. Roberts is only interested in the question of commissions, the specific legacies having been fully paid together with all the debts of the estate, and the executor, Joseph Eager, having become the owner of the residuum by purchase, Mr. Roberts has no standing to object to the correctness of the account as rendered.

Decree entered accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JUNE, 1876.

MATTER OF WARD.

In the matter of the Estate of RICHARD WARD, deceased.

Evidence that the intestate gave to his wife money with which to purchase furniture, which she did, without further evidence tending to show a gift either of the money or furniture to her as her separate property, is not enough to exonerate her from accounting for it as administratrix.

A savings bank deposit by the intestate in the name of himself and wife, entered thus, "Richard or Kate Ward," she never having had possession of the pass-book during his life, is presumptively his property exclusively.

The essential features of a gift *inter vivos* are expressions of intention to make a gift, and an actual delivery of the subject of it to the donee.* The case of *Sanford v. Sanford*, 43 N. Y., 723, questioned.

THIS was a proceeding for a final settlement of an account of the administratrix, in the matter of the estate of Richard Ward, deceased.

Objection was made to the final account rendered by the administratrix, on the ground, among others, that

*See also *Fiero v. Fiero*, 5 Supm. Ct.; (T. & C.) 151 *Reed v. Reed*, 52 N. Y., 651; *Stevens v. Stevens*, post, 265.

MATTER OF WARD.

it did not embrace a deposit, in the Excelsior Savings Bank of the City of New York, amounting to the sum of \$3,045, nor certain household furniture and chattels, worth \$800.

The proof showed substantially that the deceased in his life-time, deposited the money in question in said bank, and had the entry made in his bank pass-book "Richard or Kate Ward." That the entry was made in the bank books "Kate or Richard Ward."

That the deceased drew from the account on several occasions, but that his wife, Kate, never drew anything, until after she came into possession of the bank book subsequent to the intestate's decease.

It also appeared that Mrs. Ward had no means or separate estate.

In respect to the other item, it appeared that the intestate left considerable furniture of the value of about \$800, which was purchased by his wife with money furnished by her husband, and which was not accounted for.

Another objection, not involving any question of law, is omitted.

MAN & PARSONS, *for the Administratrix.*

THE SURROGATE.—In respect to the furniture, the proof shows that the intestate gave to his wife the money with which to purchase the furniture in question, and there is no evidence tending to show a gift, either of the money, or furniture to her, as her separate property. It therefore remained the property of the intestate at the time of his decease, and the administratrix should account therefor.

It is claimed in behalf of the administratrix that the deposit of the money in the Excelsior Savings Bank in the name of Richard or Kate Ward is evidence of a gift

MATTER OF WARD.

of the fund to Kate Ward; but it seems to me that the transaction lacks the essential features of a gift *inter vivos*, which are, expressions of an intention to make a gift, and an actual delivery of the subject thereof to the donee. (*Bedell v. Carll*, 33 N. Y., 581; *Shuttleworth v. Winter*, 55 Id., 624; *Irish v. Nutting*, 47 Barb., 370.)

It seems to me quite clear that there was not such a parting with the possession, or title to the money so deposited, as to divest the intestate of all right to the money, which is absolutely essential to a gift *inter vivos*. Indeed the fact that it was deposited by the husband in his name, as well as that of his wife, was the highest evidence, that he did not intend to part with his control over it; and the most that it seems to me can be said in respect to the deposit being to the credit, or order of his wife, also, was that it would enable her, under the rules of the bank, to draw the money in case he was unable to do so for any reason, and that in doing so, she would act as the agent of her husband in the premises.

In *Irish v. Nutting* (above cited,) it was held that where the intestate gave several notes of a third party, to his wife, saying "I give you these notes, and if I never return, they are yours," this did not constitute a gift; and Mr. Justice BACON (at page 383) says: "it clearly cannot be sustained as a gift *inter vivos* for the obvious reason that it was coupled with a condition, upon the happening of which the owner was to receive possession. An absolute gift divests the donor's title, and requires a renunciation on his part and the acquisition on the part of the donee of all title to, and interest in, the subject of the gift. A valid gift however has no reference to the future, but is one which goes into immediate and absolute effect."

Such I understand to be the true doctrine established by an unbroken line of authorities, unless it may be

MATTER OF WARD.

said to have been shaken by the case of *Sanford v. Sanford*, (45 N. Y., 723), where the language of Judge PECKHAM (at page 726) is as follows: "taking this note in the name of himself and wife, shows that the husband intended to give it to her in case she survived him, and the delivery to her was necessary to perfect the gift," which taken in its broadest signification seems to me to run directly counter to all settled notions of the law in respect to such gifts, and seems not to have been fortified by the learned Judge who delivered that opinion, by any authority.

It is with very great reluctance that I venture to question the force and effect of that decision, and yet considering that that case was the reversal of a judgment entered upon the report of a referee, in favor of the validity of a gift, upon exceptions to the rejection of testimony, and that it seems to run counter to the settled law upon the subject without a review of any of the former decisions, and as it differs somewhat widely in its facts from this case submitted for my determination, I think it my duty to hold according to the general line of authorities, that the deposit of the money in the Excelsior Savings Bank in the name of Richard or Kate Ward was not intended as a gift to the wife; and in this conclusion I am fortified by the absence of proof that the bank book was ever out of the possession of the intestate, or in the possession of the administratrix, until after his decease.

Let a decree in conformity with this decision be entered.

Decree accordingly.

MATTER OF PIKE.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JUNE, 1876.

MATTER OF PIKE.

In the matter of the Estate of NOAH F. PIKE, deceased.

Where the same persons are made both executors and trustees under the same will, such of them as decline to unite in the inventory and do not act as executors, are not entitled to executor's commissions, though they duly qualified, but they are entitled, on serving as trustees, to commissions on the sum which comes to their hands as such, and also on the income.*

Where there are more than three co-executors, administrators or trustees, entitled to commissions under the Acts of 1863 and 1866, the Surrogate cannot apportion the commissions according to their respective services, but must divide them equally.

The will appointed four persons executors and testamentary trustees, and one qualified, as executor, and took sole charge of the estate. The others afterward qualified, but did not act. On the final and last accounting of the acting executor, the fund passing to the four trustees was over \$100,000.

Held, 1. That only the acting executor was entitled to executor's commissions.

2. That all the four were entitled to commissions as trustees.

3. That the total commissions of the trustees were a sum equal to three executors' commissions, and were to be divided equally between the four.

THIS was a proceeding for a settlement of accounts in the matter of the estate of Noah T. Pike, deceased.

The question submitted for determination was as to the mode of allowing commissions to the four trustees named in the will, who were also appointed executors therein.

One executor, Dwight H. Olmstead, qualified, and took charge of the estate, for over a year before the other three executors qualified; and after the latter had qualified, the estate remained substantially under the care, control, and management of Mr. Olmstead, who in October, 1874, on a petition filed for that purpose,

* Compare *Cram v. Cram*, *ante*, p. 244.

MATTER OF PIKE.

had an accounting, in which the other executors declined to join, for the reason that they did not desire to be bound for the acts of Mr. Olmstead, who had the entire charge.

On the accounting, Mr. Olmstead was allowed one commission on the account and distribution of a portion of the estate, pursuant to the decree entered, when such accounting was had, leaving a balance of over \$180,000 which went into the hands of the four trustees as such, under the will.

A final account was afterwards rendered and the accounts duly passed, leaving nothing to be determined except the question of commissions.

TRACY, OLMSTEAD & TRACY, *for the Executors.*

W. H. ARNOUX, *for Legatees.*

CHAUNCEY SHAFFER, *for Contestants.*

THE SURROGATE.—On the argument there seems to have been some confusion, in the minds of the trustees, as to their respective rights, and also as to the mode of computing commissions on the body of the estate, and on the income thereof.

On the one side it was assumed that the two commissions not allowed to Mr. Olmstead were divisible between the other three executors; and that as to the commissions of the trustees, as such, Mr. Olmstead should be excluded because of his receipt of full commissions on his accounting as executor; while on the other hand it was contended that there could be no further allowance to the other executors for commissions as such, but the commissions must be equally divided between the four trustees as such, so far as the principal sum was concerned; but that as to the income, there was a discretion to allow such commissions as should be equitable, to the respective trustees.

MATTER OF FIFE.

As the other three executors took no part in the inventory of the estate, and rendered no account, and in fact received and paid out nothing as such executors, there is no authority for, or justice in, allowing them commissions, on the accounting by the executor Dwight H. Olmstead, but as trustees they are entitled to commissions on the sum which came to their hands as such, and upon the income also.

By chapter 115, of the laws of 1866, sec. 1, it is provided that the trustees shall be allowed the same compensation for their services, by way of commission, as are allowed by law to executors and administrators, and that if there be more than one trustee and the estate be insufficient to give full commissions to each, the Surrogate shall apportion such allowance among them, according to the services rendered respectively: but that Act refers to estates amounting to less than \$100,000, so far as the apportionment is concerned.

By chapter 362, of the laws of 1863, section 8, it is provided that if the estate shall amount to not less than \$100,000, over and above all debts, &c., and there shall be more than one executor or administrator, each and every of such executors or administrators shall be entitled to, and allowed the full amount of compensation that he would have been entitled to if he had been sole executor, or administrator, provided such compensation should not exceed the amount payable to three executors, or administrators; and if there are more than three, what would belong to three shall be divided among all in equal shares.

It will be seen that trustees, by the Act of 1866, are placed upon the same footing as executors and administrators, and by the Act of 1863 there is no authority to apportion the compensation to the respective executors and administrators, where there are more than

WEBBER v. SPANNHAKE.

three, according to the services rendered by them respectively, in cases where the amount of the estate is \$100,000 or upwards, but the latter Act requires the compensation to be divided among them in *equal shares*.

Under these statutes, I hold that the four trustees in this matter are entitled in equal proportion to the amount of three commissions on the amount of the estate coming into their hands as trustees.

Decree accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JUNE, 1876.

WEBBER v. SPANNHAKE.

*In the matter of the Estate of CATHARINE SPANNHAKE,
deceased.*

The married women's acts of 1848, &c., did not change the obligation of the husband to support the wife; nor charge the wife with her own support, except in cases where she makes herself and her separate estate liable.

If a husband calls a physician to attend his wife, and the physician, not knowing she has a separate estate, attends without intending to make any charge, the subsequent discovery of the fact that she had such estate will not enable him to claim payment from her estate.

The liability for such services, if any, is upon the husband.

THIS was a motion to confirm the report of an auditor in the matter of the estate of Catharine Spannhake, deceased.

The executor, Lewis Spannhake, was the husband of the testatrix, and a physician; and in his account rendered, he charged the estate the sum of \$270 for medical attendance on his wife, and also for the sum of \$725, paid to Dr. Webber for medical attendance upon

WEBBER v. SPANNHAKE.

the executor's wife, both which items were disallowed by the auditor.

Dr. Webber was called as a witness who testified, in substance, that Dr. Spannhake called upon him and asked him to attend his wife,—that it was not customary for physicians to make charges for services rendered in the family of a brother physician, and that he only made the charge against the estate, after he had learned that the testatrix had died leaving a separate estate,—that prior to making such charge he had been told by Doctor Spannhake that he (the Doctor) would have for such services seven or eight hundred dollars.

JOHN C. CLEGG, *for Executor.*

THE SURROGATE.—Upon the evidence as to the item of payment to Dr. Webber, it is difficult to see how the auditor could have done otherwise than he has done in respect to that charge, and his disallowance of the claim seems to be the only finding excepted to.

The amount of the estate seems to have been \$1,245-13. It is too plain for controversy that the husband is liable for necessities, including medical attendance, furnished to his wife, even though they be furnished on the application of the wife, and though she may possess a separate estate; much more so, when it appears that the husband procured the services of the physician, and particularly where the evidence shows that the services were so rendered upon the credit of the husband, the physician not knowing of any separate estate, and it appears that he regarded his claim to exist, if at all, against the husband.

The "Enabling Statute," so called, of 1848, with the amendments thereof, did not change the obligation of the husband to support the wife, nor charge the wife with her own support, except in cases where she makes her-

WEBBER v. SPANNHAKE.

self, and her personal estate, liable. In the absence of positive proof that the wife intended to, and did charge her separate estate, the law implies a liability on the part of the husband for such support; and it is too clear for argument that as the liability originally attached to the husband for the services of the physician, procured by him, the subsequent discovery of a separate estate of the wife, did not change that liability, and impose it on the wife, or her separate estate, for there was neither legal nor moral liability on her part.

Necessaries purchased by a married woman are not chargeable on her separate estate, unless expressly purchased upon the credit of it, and charged thereon by some affirmative act on her part. (*Dermott v. McMullen*, 8 *Abbott's Pr. N. S.*, 335.)

Notwithstanding the Act of 1862, chapter 172, the husband retains the right to the services and earnings of his wife. (*Filer v. New York Central R. R. Co.*, 49 *N. Y.*, 47; *Beau v. Kiah*, 4 *Hun*, 171.) All the authorities concur, that the obligation to support a wife creates a right in the husband to her services.

In *Perkins v. Perkins* (62 *Barb.*, 531,) Mr Justice PORTER, in commenting upon the statutes above referred to makes these significant enquiries: "Did any one ever suppose that the possession of some separate estate by the wife, released the husband in any degree from the common law liability, and duty to support, and maintain his wife?"

"If he refuses or neglects to furnish such support, may not a tradesman, or mechanic sue the husband for necessities furnished for her support?"

"Would it be a good defence to an action brought to recover on such legal liability, for the husband to plead that the wife had a separate estate?"

The counsel for the executor on the argument un-

BOOTH v. CORNELL.

dertook to furnish some authority from the Court of Appeals, which he claimed, justified the charge against the estate of the testatrix in this matter; but he was mistaken upon the subject of any such authority existing. Indeed the charge seems to me so obviously in violation of long, and settled principles of law, and is so repugnant to a just sense of propriety that I venture to decide the case upon the foregoing consideration, without further delay.

Let an order be entered confirming the report of the auditor.

Order accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURREGATE.—JUNE, 1876.

BOOTH v. CORNELL.

*In the matter of the Estate of CHARLES E. CORNELL,
deceased.*

Under a bequest to A. of the interest upon a fund, in case she shall become a widow, during her widowhood, payable annually,—continuing “and at her death, I give \$500 of said principal sum to,” &c., &c.,—*Held*, that the gift in remainder from the principal did not vest in interest till the death of the widow.

After a legacy to a corporation “The New York Young Men’s Christian Association” had vested in interest, but before the time for vesting in possession arrived, the corporation accepted a new charter under the name of “The Young Men’s Christian Association” of New York, which provided that on its acceptance, the former corporation should be dissolved, and all its property vested in the new corporation. *Held*, that the legacy lapsed, by the dissolution of the legatee, and the new corporation could not take it.

Testator bequeathed a fund to the “Five Points House of Industry,”—“to be applied to the uses of the farm in Westchester county.” At the time of the testator’s death the legatee had and carried on such a farm, but before the time when the legacy could vest in interest, it ceased to have such farm.

Held, that the words “to be applied,” amounted to a condition, the failure of which defeated the legacy.

BOOTH v. CORNELL.

THIS was a proceeding in the matter of the estate of Charles E. Cornell, deceased.

The question involved was the construction of the following clause of the testator's will :

" I give to my sister Louisa Adeline, wife of Salmon Booth, the interest upon \$1,500 in case she shall become a widow, during her widowhood—payable annually. At her death I give \$500 of said principal sum each to the '*New York State Colonization Society*,'—'*The New York Young Men's Christian Association*,' and '*Five Points House of Industry*,' under care of the Reverend L. M. Pease, to be applied to the uses of the farm in Westchester County.

" The interest upon said principal sum of \$1,500 for so much of the life of said Louisa Adeline, during which she shall be a widow, I give to the above named institutions to be divided equally between them, share, and share alike payable annually."

It appeared that the testator died in October, 1854 ; and that Mrs. Booth became a widow in May, 1855, and died July 8th, 1875.

It also appeared that at the time of the death of the testator, "*The New York Young Men's Christian Association*" was a corporation capable of receiving the legacy in question, but that in April, 1866, the Legislature, by chapter 350, of the Laws of that year, passed an Act to incorporate "*The Young Men's Christian Association*" of the city of New York, authorizing the former Association by vote of its former Directors, &c., to accept said charter ; (which was done) ; and provided, that when this should be done, the former corporation should be dissolved, and all its property vested in the corporation created by said Act.

It also appears that "*The Five Points House of Industry*," at the time of the decease of the testator, was pos-

BOOTH v. CORNELL.

sessed of, and operated, a farm in Westchester County ; but that at the date of Mrs. Booth's death, they had no such farm.

The questions which arose upon this state of facts, and which were submitted to the Surrogate were :

1. Whether the legacies became vested at the time of the death of the testator, and at which time both the corporations referred to, could have taken ; and if not ;

2 Whether the Act of the Legislature, in respect of "*The Young Men's Christian Association*," dissolved the former corporation, so that the legacy lapsed, or whether the present incorporation was entitled to receive it, and

3. Whether the legacy to "*The Five Points House of Industry*" lapsed because at the time of the death of Mrs. Booth it was not possessed of, or operating a farm, in Westchester County.

ROBERT F. LITTLE, *for the Executor.*

GEORGE F. BETTS, *and others, for Legatees.*

THE SURROGATE.—I am of opinion that the respective legacies did not vest before the decease of Mrs. Booth, and that at her death, "*The New York Young Men's Christian Association*" had ceased to exist, and that the legacy therefore lapsed.

In the numerous authorities considered in the case of *Patterson v. Ellis* (11 *Wend.*, 253), the distinction is discussed, and recognized, between legacies given at a day, or payable at a day. It is held, that time in the first case is annexed to the legacy itself, in the second, only to its payment ; that in the first instance, the legacy does not vest until the time specified, and in second, that it vests on the death of the testator.

From the language of the bequest under consideration, it seems to me that it leaves no room for doubt that the time, to wit, the death of Mrs. Booth, was an-

BOOTH v. CORNELL.

nexed to the legacy, and the intention of the testator, which is always a controlling consideration, was clearly to give no interest in the principal sum itself, to the corporation named, until after the death of Mrs. Booth, and was conditioned on that event; the legacy must be held therefore to have lapsed as to "*The Young Men's Christian Association.*"

I am not able to appreciate the argument, that because the present corporation is supposed to be engaged in the same charitable Christian work, it may be for that purpose regarded as the same corporation; and if not the same, it seems to me that the request given to the corporation is like one given to an individual, and that if it does not vest at the time of the death of the testator, and there is no such person to take, when it would otherwise vest, it must be held to have lapsed; and it would be no answer to say that there was some individual, who would use the fund for the same purposes.

As to the legacy to "*The Five Points House of Industry,*" it is true that the corporation existed at the time of the decease of Mrs. Booth, but it also appears that the bequest was on condition, that it devote the legacy to the purposes for which it was intended by the testator, and the term "to be applied" I think amounts to a condition, the now happening of which, defeats the legacy. (See *Caw v. Robertson*, 5 N. Y., 125; *Wheeler v. Lester*, 1 *Bradf.*, 213, and cases cited.)

On such examination and reflection as I have been able to give this matter, I am of the opinion that both of the legacies lapsed, for the reasons above stated, and that neither of said corporations are entitled thereto.

Decree accordingly.

STEVENS v. STEVENS.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JUNE, 1876.

STEVENS v. STEVENS.

In the matter of the Estate of PARAN STEVENS, deceased.

To constitute a gift *inter vivos* there must be an expression of intention to make a gift, and an actual delivery to the donee.*

The testator, while living, subscribed to shares in an Opera House corporation, and took the certificates in his own name; but the ticket issued to him for the box represented by his shares, he delivered to his wife. He said he purchased the box for her, and that she needed no other evidence of ownership than the tickets. She enjoyed the use of the box, and he allowed her to rent it and receive the rent for her own use. *Held*, that this did not establish a gift of the shares to her; that she occupied by his license, and for occupancy after his death, his executors might charge her rent. †

A husband whose wife was going abroad with their daughter provided her with circular notes in the nature of a commercial or traveler's credit for their expenses and purchases. He died while they were abroad. *Held*, that so much of the credit as was used for expenditures while abroad, and returning on hearing of his death, could not be charged to her by the executors, but she was chargeable with notes collected by her bankers after her return.

Where real property of the decedent was set apart to the trustees of a legatee in fulfillment of a gift in the will, under an agreement that the legatee was to be responsible for repairs after a specified date, *Held* that repairs made after that date, though ordered before it, were chargeable to the legatee.

A large house constructed and recently furnished for letting in apartments was set apart to a legatee as a part of the gift intended by the will, under an agreement that she should take the furniture "at a valuation." *Held*, under the circumstances, that the valuation should be as for the purpose of letting in the apartments, not for the purpose of removing and selling as second-hand furniture.

The agreement for such transfer provided that the legatee should receive the rents from a specified date. *Held*, that the legatee was entitled to be reimbursed by the estate a sum which she had to deduct from the rent collectable, by reason of a breach of the decedent's covenant, as to the condition of the premises in the lease he had given to a tenant.

*As to extrinsic evidence of intent, see *Philips v. McCombs* (53 N. Y., 494,

† For a case of gift of stock or interest certificates, see *Brundage v. Brundage* (60 N. Y., 254.) See also *Matter of Ward, ante*, p. 251.

STEVENS v. STEVENS.

Where executors paid bills for repairs and household expenses dated after the testator's death, *Held*, upon the testimony of the widow that they were in fact incurred before his death, that they could not charge them to the widow.

Expenditures for insurances of property in which the widow had only a life estate, made by the executors, without her authority, and largely for the benefit of the ultimate estate,—*Held*, not chargeable by the executors to her.

The testator, after making provision for a married daughter, directed that in case there should be other children of his living at his death, a specified sum which he had advanced to the married daughter be deducted, with interest, and with any other moneys which he might advance after a specified date, adding in parenthesis (also the further sum of \$86,000.) He made the husband of the daughter an executor. It appeared that the testator had informed the draftsman of his will that the \$-6,000, represented claims which the testator held against the son-in-law.

Held 1. That parol evidence of that statement was admissible to enable the court to construe the clause.

2. That although there was no direct gift to the executor, there was sufficient indication of testator's intent that the claim against him, if enforced at all, should be enforced by deducting it from his wife's bequest, so as to exonerate the executor in omitting the claim from the inventory, and from being charged therefor as for an asset.

The rule that the Surrogate cannot determine disputed claims on an accounting, does not preclude him from determining a controversy as to whether a claim against an executor is discharged by the will.

THIS was a proceeding on the final accounting by the executors of the will of Paran Stevens, deceased.

The account was filed by John L. Melcher and C. G. Stevens, two of the executors, on the 4th June, 1874, to which Marietta R. Stevens, executrix, filed objections, September 4, 1874, stating that the account was filed without her being joined, and insisting on her right to join in such accounting, so that she might be discharged as such executrix.

Among the objections thus filed by Marietta R. Stevens, were the following:—

To the sum of \$11,390.69, in schedule under date August 10th, 1872, Duncan, Sherman & Co.; use of opera box in the Academy of Music, \$1,125; furniture in Apartment House, \$10,967.88.

STEVENS v. STEVENS.

That the accounting in one of the schedules (B), should include J. L. Melcher's note for \$20,000, and the sum of \$51,347.87 due from said Melcher to said estate, on an instrument bearing date September 5th, 1868, with interest.

That schedule B improperly contained four shares of the New York Academy of Music stock, which was her individual property.

That in another schedule (C) the sum of \$200, paid Kingsland subscription for the Academy of Music shares, should be charged to her individually.

That there should be charged to said estate, and credited to her, \$450, for traveling expenses as executrix; \$500, rent of office in the Apartment House, and sundry bills for work on the same.

The items first referred to above, and not specified, consisted of certain bills paid by the estate, and charged to Mrs. Stevens, for purchases made in Europe, apparently in June and July, 1872, for work supplies, and help, upon the apartment house, and upon the house in Newport.

Subsequently, on the 16th day of October, 1874, an order was made, on application of Mrs. Stevens, that she join in the accounting as executrix, and that the account filed by the executors, with charges to correspond with the exceptions filed by Mrs. Stevens, be taken as hers, as such executrix, as though filed by her.

Objections to the account so filed by Mrs. Stevens, executrix, were filed by the executors as such, and trustees, and by said Melcher, Ellen S. Melcher and J. L. Melcher, purporting to bear date September 23rd 1874, but doubtless intended to apply to the account, deemed filed, under the order of October, whereby they objected substantially to the items covered by the objections of Mrs. Stevens, and which were by the Surro-

STEVENS v. STEVENS.

gate deemed as incorporated into, and forming part of, the account, and deemed filed by her.

On April 14th, 1875, there seem to have been additional exceptions interposed by Mrs. Stevens in respect to certain insurances charged to her in schedule E, but as to which there appears to have been no evidence given in the case.

On these objections, the matter was referred to the late Surrogate Van Schaick, as auditor; and about two thirds of the testimony was taken before him as such auditor; and after he had assumed the duties of Surrogate, the residue of the testimony was taken before him, but the case was not determined before his death.

What purported to be a copy of said auditor's report without signature, is presented to me, apparently determining all the questions raised by the objections in favour of Mrs. Stevens, but there was nothing appearing among the papers to explain the occasion of filing such report, before the testimony was closed; but counsel advised that it was done *pro forma* to enable the parties to make use of the testimony already taken before the auditor, on continuance of the hearing before him, as Surrogate.

Under these circumstances, the matter was submitted and determined as though no such report had been made.

It appeared from the testimony that the testator died April 25th, 1872, at his residence in this city, leaving his widow Mrs. Marietta R. Stevens, and two children by her, a daughter Miss Mary Fiske Stevens, now of full age, and a son Henry Leiden Stevens, now about 18 years old, also a daughter by an earlier marriage, Ellen, wife of J. L. Melcher.

By his will dated July 10th, 1869, the testator among other provisions left to his wife a legacy of \$100,000, also in trust for her benefit, one million dollars.

STEVENS v. STEVENS.

By a codicil dated April 21st, 1872, he left to his son in addition to the provisions in his will, \$300,000, payable upon the son arriving at the age of 30 years; the residue of his estate, including the trust to Mrs. Stevens, after her death, he directed to be divided into three shares, one of which was left in trust for the benefit of each of his three children.

The facts material to the specific questions passed by the Surrogate were as follows :

1. It appeared by the testimony that Mr. Stevens subscribed for four shares, each of \$1,000, of stock in the Academy of Music and took the certificates in his name; that the certificates entitled the owner to four seats in a box; that the box allotted to Mr. Stevens was called "the Grisi box," and that tickets were issued to the owner of the box, the possession of which gave the right to its occupancy, under the regulations of the corporation; that Mr. Stevens said, when he purchased the box in question, that it was for his wife; that he told her that he had purchased the box for her; she asked him what evidence she had to show that it was hers; he delivered the tickets to her and said to her that it was not necessary that she should have any evidence of ownership; that it was hers in fact. It appeared that she occupied it with other members of the family; she at one time rented the box, and received the rent herself, with the knowledge and approbation of her husband. It appeared however that the certificates of stock were never transferred to her, but retained by Mr. Stevens; that in order to transfer the shares of stock under the regulations of the Academy, it was necessary to surrender the certificate, and take new ones, in the name of the purchaser.

It also appeared that Mr. Stevens, in his life-time, included the opera box in his inventory of his estate, which he was in the habit of making annually; that

STEVENS v. STEVENS.

Mrs. Stevens after his death had occupied the box, and that the rent amounted to \$1,125, which by the executors was charged to her; that she, after Mr. Steven's death, paid \$200 for an assessment on said box and, as executrix, charged the same to the estate.

2. The next question in dispute related to a charge made against Mrs. Stevens of \$11,390.69, the proceeds of circulating notes of credit issued by Duncan, Sherman & Co. for £2,000 sterling under the following circumstances. In March, 1872, Mrs. Stevens and her daughter were about to leave for Europe. Just previous to her departure, Mr. Stevens procured from Duncan, Sherman & Co. circulating notes, to the amount of £2,000, and delivered them to Mrs. Stevens for the purpose of paying her expenses, and for her use, together with the expenses of the daughter. Mr. Stevens gave his note for £1,300, Mrs. Stevens desiring to take but that amount at first, but Mr. Stevens urged her to take £2,000. By inadvertence he did not execute the note for the balance of £700—the terms of the note being substantially that Mr. Stevens would pay the sum mentioned, or so much thereof as should be used of such circulating notes, with the interest, exchange, &c., which notes were payable at the Union Bank, London.

Mrs. Stevens went to Europe with her daughter, and had arrived but four or five days in Paris, when she received intelligence of the death of Mr. Stevens. In the meantime, she had used about £200 of said notes in payment for purchases made by her, including the money used by her, in paying the expenses of herself, and daughter. On her return, she made some purchases by way of mourning apparel, after receiving the intelligence of her husband's death, and before her departure for home, leaving eighteen hundred pounds, equal to

STEVENS v. STEVENS.

\$10,241.54, which notes she retained until some time in the summer after her return to New York; when, on consultation with Mr. Sherman, she negotiated them and received the proceeds.

Mrs. Stevens claims that the £2,000 was a gift to her, and that no part of that sum should be charged to her, by the executors.

3. The next items objected to by Mrs. Stevens were: June 12, 1872, J. Monroe & Co., \$1,408.68; July 1, Henry Clews & Co., \$62.20; September 20th, J. Monroe & Co., \$1,316.79, charged to her,—being for personal expenses, incurred after Mr. Stevens' death,—the executors having charged her with all bills paid, which bore date subsequent to the death of Mr. Stevens. Most of these accounts, Mrs. Stevens testified, were incurred prior to Mr. Stevens' death; some small portion however incurred after his death, together with small sums for mourning, &c.

4. The next items objected to by Mrs. Stevens were for certain repairs made upon the apartment house (so called) which was transferred to Mrs. Stevens under an agreement bearing date October 28, 1873, by which the "apartment house" was transferred, at a valuation, to trustees of Mrs. Stevens, on account of the one million trust legacy, the agreement providing that the transfer should be made, as of the 1st of May, 1873, she to be allowed for rent from that date, and to be responsible for repairs after April 26, 1873, providing also that she would allow at cost for the furniture in said house ordered after April, 1873, and for that previously ordered at a valuation. The repairs objected to were actually made after the 26th day of April, 1873, but a portion of them had been ordered, or contracted for before that period.

5. The next objection related to the furniture of the

STEVENS v. STEVENS.

apartment house. It appeared that Messrs. Colton and Taylor appraised the furniture in the apartment house, purchased prior to 1st of April, at \$7,348.56, being 10 per cent. discount on the bills as purchased—the furniture having been purchased between December, 1872, and April 1st, 1873—and appraised that purchased after April 1st, at \$2,802.80, aggregating \$10,151.38. It appeared that this appraisal was made on the invitation of the executors, but it was claimed to have been made without the knowledge of Mrs. Stevens; it appearing also that one Colton, a large dealer in second-hand furniture, on the invitation of Mrs. Stevens, estimated the furniture, appraising it at \$4,550.80, second-hand furniture, valuing it at what it would bring taken out of the premises, and sold. Mr. Taylor was a large furniture dealer, and had sold most of the furniture to the estate. Mr. Cranston, the other appraiser, had made the purchases, and received the furniture into his house.

The executors claimed that as the agreement between the parties provided for Mrs. Stevens taking the furniture at a valuation, with the house, it was proper to estimate its value as a part of the estate in reference to its use in the house; while Mrs. Stevens claims that the estimate should be made independent of the fact that she was to have the house; that it was to be sold as for a second-hand sale in the market.

6. The next objection related to the charge made by Mrs. Stevens against the estate of \$500 for the use of an office in the apartment house by the executors from May 1st to November 1st, 1873.

It appeared that the executor had used the same office prior to the date mentioned, and they continued to occupy it until November 1. But it was alleged by the executors that it was also occupied for the business of the apartment house, and that the charge was too high.

STEVENS v. STEVENS.

7. The next objection was to the charge made by Mrs. Stevens as executrix of \$450 for traveling expenses &c., she testifying that such expenses were incurred necessarily in visits to attend to the business of the estate—particularly as to the property situated in Boston.

8. Mrs. Stevens also claimed to charge the estate with the sum of \$1,925, and allowed by her to J. B. Brewster & Co. for damages done to their carriages, they occupying a portion of the apartment house, and the damage occurring on the 17th of October, 1873, said Brewster being in, under a lease made with the estate prior to April 1st, 1873. Mrs. Stevens, as she testified, had been compelled to allow that amount of damage when she settled with Messrs. Brewster & Co. for the rent—subsequently to her taking the premises under the agreement of date October 27, 1873. On the other hand, the executors claimed that Mrs. Stevens, under that agreement, became the equitable assignee of the lease and liable as sub-tenant for any damage which occurred as after 1st of May, 1873, to which time, her possession and right related.

9. The next objection was as to a number of items charged to Mrs. Stevens individually by the executors under dates of June 25, 1872, July 30th, Sept. 18th, October 11th, December 14th, in the same year, being for supplies, repairs, &c., furnished, and made upon the house occupied as a residence by the deceased, and the house and premises at New York given to Mrs. Stevens by the will, and for the care of her houses; some of which bills and charges, however, were increased between the period of Mr. Stevens' death, and Mrs. Stevens' return to New-York, and were all charged to her, because incurred subsequent to Mr. Stevens' death, though Mrs. Stevens testified that some of the repairs on the Newport house were incurred prior to Mr. Stevens' death. The charge,

STEVENS v. STEVENS.

September 18th, sundry bills, \$698.13, appeared to have been for household expenses of Mrs. Stevens, and for servants' wages paid and incurred, after Mr. Stevens' death, including a charge for livery of coachman, and groom, and the wages of the coachman, cooks, butler, groom &c. It also appeared by the testimony of Mr. Melcher that all the bills, and servants' wages to the death of Mr. Stevens were paid by him, and charged in his account.

10. The next series of charges discussed by the respective counsel, consisted of several items of insurance from June 13th, 1872, to December 6th, 1873, upon the Fifth Avenue and Newport property. There was no evidence that Mrs. Stevens had any personal knowledge of these insurances, but they appeared to have been upon the property in which Mrs. Stevens had only a life interest; but to these items there seems to have been no objections filed

12. The next and final question raised, by the objections filed by Mrs. Stevens, related to the alleged omission to state in schedule B, a note of J. L. Melcher for \$20,000, and to an alleged indebtedness of his to the estate of \$51,347.87, with interest on both.

In relation to these charges the testimony showed substantially that while Mr. Stevens was absent in Europe in 1867-68, Mr. Melcher, a son-in-law of Mr. Stevens, was left in charge of certain Pacific Mail stock owned by Mr. Stevens, with instructions to sell the same; that Mr. Melcher did sell and deal in said stock and deposited the proceeds with Messrs. Temple & Marsh, brokers in Wall street, and that subsequently, and prior to Mr. Stevens' return, Temple & Marsh failed, and there was a loss of the sum of \$51,347.87, for which Mr. Melcher, on Mr. Stevens' return, on the 5th day of September, 1868, assigned to Mr. Stevens the monthly divi-

STEVENS F. STEVENS.

dends which should be earned on said Melcher's share of the profits of the business of Darling, Griswell & Co., or their successors, from the 1st day of August, 1877, until the sum above mentioned should be realized by said Stevens, with interest, being an interest owned by said Melcher in the Fifth Avenue Hotel receipts, &c. The testimony also showed that on Mr. Stevens' return, Mr. Melcher had an outstanding note or obligation, which it was important for him to meet, and which he could not meet without the aid of Mr. Stevens to the amount of \$20,000—that Mr. Stevens advanced that sum to Mr. Melcher, and took his note for the amount.

Mr. Melcher's interest in the Fifth Avenue Hotel profits it appeared was the gift by Mr. Stevens to Mr. Melcher—Mr. Melcher executing an instrument by which he undertook to pay out of the earnings thereof \$22,689.59. It also appeared that, in December, 1871, Mr. Melcher, by a letter addressed to Mr. Stevens, recognized his obligation, but that there never was any demand made upon him for payment.

It appeared that Mr. Stevens, in his life-time, was in the habit of making an inventory of his effects on the 1st day of January of each year—that he included in it the advances made to his children, with interest, and embraced also his wife's jewels.

By his inventory of January 1st, 1871, he entered "paid Ellen M. Melcher," and charged in account \$59,975.31, with interest thereon, \$8,396.56 ("also additional \$86,000").

In his inventory of January 1st, 1872, the following entry appeared: "paid Ellen M. Melcher's charge on account and interest to date, harness bill and all \$80,-187.86—also additional amount lost by M. and interest \$92,000."

By the last will and testament of Mr. Stevens bearing

STEVENS v. STEVENS.

date July 10th, 1869, in the eleventh clause thereof, he provided, that if there should be any other children, descendants of his, living at the decease of his wife, other than his daughter Ellen (Mrs. Melcher) and her issue, there should be deducted from the share of said Ellen, in the principal of said trust fund (of one million) created for the benefit of his wife, added to the shares of the others therein, the sum of \$59,975.31, which included all the moneys he had paid and advanced to her, with interest up to the 1st day of January, 1869, to draw interest annually, until his decease, and also any other sum, or sums that he should or may have advanced after the 1st day of May, 1869, and charged to her account (also the further sum of \$86,000).

The evidence also showed that Mr. Arnold, who drew the will, was informed by Mr. Stevens that the clause respecting the \$86,000 represented, and was intended to cover the \$20,000 and the \$51,347.87 lost by Mr. Melcher in the Pacific Mail transaction with Temple & Marsh.

JOHN E. BURRILL and J. V. B. ARNOLD, for the Executors.

JOHN E. PARSONS, for the Executrix, in opposition.

THE SURROGATE.—In passing upon the question raised by the objections to the account in this matter I shall consider them *seriatim*.

1. As to the ownership of the opera box, the question is whether the facts proved constitute a gift to Mrs. Stevens *inter vivos*.

The counsel for Mrs. Stevens cited several authorities upon his brief showing that a chose in action may be assigned by parol, to sustain the claim of Mrs. Stevens to the opera box in question; but in each of the cases referred to, as I understand them, there was an actual delivery of the evidence of the indebtedness, and

STEVENS v. STEVENS.

it seems to me, that if Mrs. Stevens is entitled to hold the opera box in question, as her property, it must be because of the gift by her husband *inter vivos*. To constitute such a gift, there must be an expression of intention to make a gift, and actual delivery of the subject thereof to the donee. (*Bedell v. Carll*, 33 N. Y., 581; *Shuttleworth v. Winter*, 55 Id., 624; *Irish v. Nutting*, 47 Barb., 370.)

In the last case cited, Judge BACON (at page 388) says: "An absolute gift divests the donor's title, and requires a renunciation on his part, and the acquisition on the part of the donee, of all title to, and interest in, the subject of the gift." The evidence in this case shows that the title to the box in question consisted of four certificates taken, and remaining in the name of Mr. Stevens, and that the tickets were the only evidence of the right to occupy, which were delivered to Mrs. Stevens. The expression of an intention to give the box to Mrs. Stevens did not consummate the gift, but it was necessary either to deliver the subject of the gift, or some evidence of title. It is quite evident that if Mrs. Stevens, on the faith of the four tickets and the allegation of ownership, had transferred the box in question to a third party, Mr. Stevens might have taken proceedings to eject the purchaser and to resume his authority over it. It seems to me equally clear that Mr. Stevens in stating that the box was his wife's, in view of his retention of the evidence of the title, did not show any intention to be divested of his title to, or control over it.

I do not attach much significance to the fact that Mr. Stevens inventoried the box, as his property, because he was in the habit of including in his inventory money which had been advanced to his children, and his wife's jewels; nor do I think that Mr. Stevens' payment of the

STEVENS v. STEVENS.

assessment upon the box, and charging it to the estate, affects the question of title, as that question must be determined upon well settled principles of law, nor is the fact in my opinion at all controlling that the executors and executrix included the box in the inventory

It is not my province to determine as to the propriety of the claim made by the executors, either as to the ownership of the box, or the charge to Mrs. Stevens of the rental. These are questions of propriety which address themselves with more or less effect to the parties interested in the controversy.

The transaction, as it seems to me, lacks the essential ingredients of a gift *inter vivos*; and therefore I must hold that the *Box* is the property of the estate, and properly inserted in the account; and that being so, Mrs. Stevens only had a license to occupy by permission of the testator and the authority of the tickets, which ceased on testator's death; and that Mrs. Stevens is chargeable with the use of it from that period.

2. The question of Mrs. Stevens' liability for the balance of the sum furnished to her by Mr. Stevens, is one, it seems to me, depending on the intention of Mr. Stevens at the time the advance was made, and to be derived from all the circumstances of the case.

It is quite clear that so far as Mr. Stevens' liability to Messrs. Duncan, Sherman & Company is concerned, it is dependant upon the amount of the circulating notes actually used; yet it is equally clear that that liability could be fixed by the use of the notes, whether in accordance with, or in violation of, the intention of Mr. Stevens, respecting their use, and that the subsequent collection of the amount after his death, by Mrs. Stevens, as between the estate, and Messrs. Duncan, Sherman & Co., made the estate liable for the full amount. But the terms of the note given by Mr. Stevens, and the

STEVENS v. STEVENS.

liability which subsequently attached, do not throw much light upon the intention of the parties as between themselves.

The fact that these circulating notes were procured by Mr. Stevens, and delivered to his wife, for the purpose of defraying the traveling and personal expenses of Mrs. Stevens and her daughter in Europe, and for the purpose of investing in household furniture and ornaments, indicates to any mind no intention on the part of Mr. Stevens to give up all control over that amount of money, in the event that it should not be used for the purposes contemplated. Some portion of it was to be devoted to the expenses of his daughter, and it cannot be supposed that he intended to part with all interest in it, and leave Mrs. Stevens at liberty to decline to defray the expenses of her daughter, or to raise other moneys on his credit to pay the expenses of such journey; nor can it be doubted that if Mrs. Stevens should have used the money in question in purchasing articles of household furniture, such furniture would have been the property of Mr. Stevens.

Suppose that Mrs. Stevens by some accident failed to go to Europe altogether, I think it cannot be reasonably pretended that she could still, as against her husband, claim to be a donee of these circulating notes. The circumstances of the case do not show an intention on the part of Mr. Stevens to part with all right to or authority over the money. It was delivered for the purpose of being used to defray expenses, &c., for which Mr. Stevens himself was properly chargeable, and its delivery for that purpose, to my mind, evinces no determination to divest himself of all control or authority over it; and if Mrs. Stevens had died possessed of any of these notes, or their proceeds, there would have been no necessity for instituting proceedings in respect to

STEVENS v. STEVENS.

them as belonging to her estate, but they might have been taken by Mr. Stevens as his property.

That portion of the notes used by Mrs. Stevens according to the purpose of their delivery, while abroad, and on her return, cannot be reasonably claimed by the estate, but the £1,800—not used until July 11th, 1872, and then collected by her, equal to \$10,241.54—it seems to me, belongs to the estate, and should be charged to Mrs. Stevens in the account.

3. From the testimony, I think that the accounts—J. Monroe & Co., \$1,408.68, \$1,316.79, H. Clews & Co. \$62.20—are proper charges against the estate, and are not chargeable to Mrs. Stevens individually, although the debts of the respective creditors appear to be subsequent to the decease of Mr. Stevens; yet the positive testimony of Mrs. Stevens, that they were incurred prior to his decease, sufficiently establishes the liability of the estate.

4. The charges for repairs upon the Apartment House appear to have been subsequent to the 26th day of April, 1873, and by the terms of the agreement between the trustees and the executors, it is provided that such trustees should be responsible for such repairs since April 26th, 1873.

Under this agreement I think there can be no doubt of the liability of the Trustees for the repairs mentioned, notwithstanding they may have been ordered prior to the 26th day of April, 1873. Indeed the agreement itself seems to leave no reasonable doubt of that construction. The language is: "Mrs. Stevens' Trustees to be responsible as Trustees, for repairs since April 27th, 1873," evidently referring to repairs made since that period, not to such as may have been ordered since that time. These charges are therefore properly made against Mrs. Stevens.

STEVENS V. STEVENS.

5. The question as to the liability of Mrs. Stevens for the value of the furniture of the Apartment House, and the mode of ascertaining that value, is a question of embarrassment. The agreement above referred to, in its fourth paragraph provides as follows:—"Mrs. Stevens shall allow at cost for the furniture of the Apartment House, ordered in and after April, 1873,—and for that previously ordered at a valuation, and she shall take it."

It appears by evidence undisputed, that the furniture purchased after April 1st, 1873, cost \$2,802.80, but the dispute arises in respect of the value of the furniture of the house prior to that time.

On the argument, I was inclined to the opinion that the agreement contemplated an appraisal by some persons to be selected by the respective parties; but as that seems not to have been done, the question must be determined upon the valuation which was made, and the only difference in the estimate seems to arise from the principle upon which the respective appraisers valued the property. Messrs. Taylor and Cranston appraised it at 10 per cent. less than cost, upon the proof that it was judiciously purchased at a then recent date, and upon the assumption that it was to continue in the house, as a part of the establishment, and their estimate makes the amount \$7,348.56, while Mr. Colton testified that his estimate of \$2,348.50 was based upon its value, removed from the house, and sold in the market as second hand-furniture.

It is quite clear that the purchase by Mrs. Stevens, and the sale by the estate of the furniture, in question, was upon the assumption that the furniture was to remain a part of the establishment, and that its estimate of value should be based upon that theory, and it seems to me that taking the circumstances and situation of

STEVENS v. STEVENS.

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STVENS v. STEVENS.

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It appears by evidence undisputed that the shares were purchased after April 1st, 1873, cost \$242,000.00. The dispute arises in respect of the value of the shares at the time of the sale to that time.

[illegible]

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

2. Once the problem is identified, the next step is to define the objectives and goals of the project. This helps to clarify what needs to be achieved and provides a clear direction for the team.

3. The third step is to develop a plan or strategy to address the problem. This involves breaking down the problem into smaller, manageable tasks and determining the resources needed to complete them.

4. The fourth step is to implement the plan. This involves putting the strategy into action and monitoring progress to ensure that the project is on track.

5. The final step is to evaluate the results of the project. This involves assessing the outcomes against the objectives and goals and identifying any lessons learned for future projects.

STEVENS v. STEVENS.

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STEVENS v. STEVENS.

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It appears by evidence undisputed, that the furniture purchased after April 1st, 1873, cost \$2,802.80, but the dispute arises in respect of the value of the furniture of the house prior to that time.

On the argument, I was inclined to the opinion that the agreement contemplated an appraisal by some persons to be selected by the respective parties; but as that seems not to have been done, the question must be determined upon the valuation which was made, and the only difference in the estimate seems to arise from the principle upon which the respective appraisers valued the property. Messrs. Taylor and Cranston appraised it at 10 per cent. less than cost, upon the proof that it was judiciously purchased at a then recent date, and upon the assumption that it was to continue in the house, as a part of the establishment, and their estimate makes the amount \$7,348.56, while Mr. Colton testified that his estimate of \$2,348.50 was based upon its value, removed from the house, and sold in the market as second hand-furniture.

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STEVENS v. STEVENS.

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STEVENS V. STEVENS.

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STEVENS v. STEVENS.

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STEVENS v. STEVENS.

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On the argument, I was inclined to the opinion that the agreement contemplated an appraisal by some persons to be selected by the respective parties; but as that seems not to have been done, the question must be determined upon the valuation which was made, and the only difference in the estimate seems to arise from the principle upon which the respective appraisers valued the property. Messrs. Taylor and Crauston appraised it at 10 per cent. less than cost, upon the proof that it was judiciously purchased at a then recent date, and upon the assumption that it was to continue in the house, as a part of the establishment, and their estimate makes the amount \$7,348.56, while Mr. Colton testified that his estimate of \$2,348.50 was based upon its value, removed from the house, and sold in the market as second hand-furniture.

It is quite clear that the purchase by Mrs. Stevens, and the sale by the estate of the furniture, in question, was upon the assumption that the furniture was to remain a part of the establishment, and that its estimate of value should be based upon that theory, and it seems to me that taking the circumstances and situation of

STEVENS v. STEVENS.

them as belonging to her estate, but they might have been taken by Mr. Stevens as his property.

That portion of the notes used by Mrs. Stevens according to the purpose of their delivery, while abroad, and on her return, cannot be reasonably claimed by the estate, but the £1,800—not used until July 11th, 1872, and then collected by her, equal to \$10,241.54—it seems to me, belongs to the estate, and should be charged to Mrs. Stevens in the account.

3. From the testimony, I think that the accounts—J. Monroe & Co., \$1,408.68, \$1,316.79, H. Clews & Co. \$62.20—are proper charges against the estate, and are not chargeable to Mrs. Stevens individually, although the debts of the respective creditors appear to be subsequent to the decease of Mr. Stevens; yet the positive testimony of Mrs. Stevens, that they were incurred prior to his decease, sufficiently establishes the liability of the estate.

4. The charges for repairs upon the Apartment House appear to have been subsequent to the 26th day of April, 1873, and by the terms of the agreement between the trustees and the executors, it is provided that such trustees should be responsible for such repairs since April 26th, 1873.

Under this agreement I think there can be no doubt of the liability of the Trustees for the repairs mentioned, notwithstanding they may have been ordered prior to the 26th day of April, 1873. Indeed the agreement itself seems to leave no reasonable doubt of that construction. The language is: "Mrs. Stevens' Trustees to be responsible as Trustees, for repairs since April 27th, 1873," evidently referring to repairs made since that period, not to such as may have been ordered since that time. These charges are therefore properly made against Mrs. Stevens.

STEVENS V. STEVENS.

5. The question as to the liability of Mrs. Stevens for the value of the furniture of the Apartment House, and the mode of ascertaining that value, is a question of embarrassment. The agreement above referred to, in its fourth paragraph provides as follows:—"Mrs. Stevens shall allow at cost for the furniture of the Apartment House, ordered in and after April, 1873,—and for that previously ordered at a valuation, and she shall take it."

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It is quite clear that the purchase by Mrs. Stevens, and the sale by the estate of the furniture, in question, was upon the assumption that the furniture was to remain a part of the establishment, and that its estimate of value should be based upon that theory, and it seems to me that taking the circumstances and situation of

STEVENS v. STEVENS.

the parties into consideration, it would be a very unjust estimate to base its value upon a probable sale disconnected with the establishment, as second-hand furniture. The real question is, what was the value of the property to the estate as forming part of the establishment, or what was the value to Mrs. Stevens under the same circumstances.

As there seems to be no practical mode of correcting the different valuations, I am constrained to regard that made by Messrs. Taylor & Cranston as the true valuation, and hold that the charge of \$10,967.88 on account of such furniture, is properly made against Mrs. Stevens.

6. The charge of \$500 for rent of office in the Apartment House, I think under the evidence too much, as the same office was used for the benefit of the Apartment House, and that \$250 would be a reasonable charge for that purpose, which I think should be allowed.

7. The charge of \$450 claimed for traveling expenses of Mrs. Stevens, under her evidence should be allowed at that sum.

8. The amount paid J. B. Brewster & Co. of \$1,925 for damages done to their carriages by the blowing out of a plug of the steam pipes belonging to the house, and which was paid by Mrs. Stevens, or rather retained by Messrs. Brewster, they refusing to pay because of the alleged breach of their lease with Mr. Stevens, should, I think, upon principles of equity be allowed to Mrs. Stevens.

There was, doubtless, a liability on the part of the Stevens' estate under their lease, for the damages in question; and as by agreement of October, 1873, Mrs. Stevens was to be allowed rent from May 1st, 1873, she was deprived of that rent by reason of the breach of the lease, on which the estate was liable, it seems to me that

STEVENS v. STEVENS.

that liability having been answered by Mrs. Stevens, by reduction of the rent, due to her by virtue of the agreement of October, she has paid so much of the estate's debt, and should be credited therefor; otherwise it would be so much diminution of her trust legacy, which the estate had undertaken to secure by the transfer of the Apartment House in question, and the rent thereof from May 1st.

9. The various charges to Mrs. Stevens, for supplies, repairs, &c., of the New York and Newport residences according to the testimony of Mrs. Stevens, were incurred before the death of Mr. Stevens, and could have been enforced against the estate, by the respective creditors, notwithstanding the bills were rendered at some time after the decease of Mr. Stevens. Yet the executors having paid them, and most of them having been incurred either before Mr. Stevens' death, or before the return of Mrs. Stevens to this country, I am of opinion that they are a proper charge against the estate, and should not be charged to Mrs. Stevens.

10. As to the charges in exhibit E, against Mrs. Stevens, for insurances of the residence at Newport, and of No. 244 Fifth Avenue, I am embarrassed somewhat by the allegation in the brief for the executors, that no exceptions to the account in that respect have been filed, while among the papers submitted to me, I find further exceptions under date of April 14th, 1875, by Mrs. Stevens, embracing these matters of insurance, and I must assume that they are properly before me for consideration, and as it appears that these charges for insurance, were upon policies issued upon the property in which Mrs. Stevens only has a life estate, and were incurred largely for the benefit of the ultimate estate, and were paid without Mrs. Stevens' authority, or intervention, I am of the opinion that the charges in that re-

STEVENS v. STEVENS.

spect should be disallowed, and the expenses sustained by the executors.

11. I have now reached, the final and more embarrassing questions involved in this accounting, and that relates to the \$20,000 note of Mr. Melcher, and his obligation of \$51,347.87 dated September 5th, 1868, and the effect of Mr. Stevens' will, and the alleged charge of said claims to Mrs. Melcher.

As the testimony of Mr. Arnold throws considerable light upon the intent of the testator in respect to these claims by charge to Mrs. Melcher in the following language, "also the further sum of \$86,000"—the admissibility of this testimony is disputed by counsel for the executors, and I must therefore consider that question first.

On a careful examination of the authorities upon the question, I am of the opinion that the testimony given by the witness Arnold who drew the will, in respect to a statement of the testator, as to the purpose of the provision charging \$86,000 to Mrs. Melcher, is not obnoxious to the rule prohibiting the giving of parol evidence, to explain, modify, or contradict, written instruments, but is admissible as explanatory of the intent of testator, and as giving point, and meaning to the provisions of the will, which its terms alone do not make apparent.

In *ex parte Hornby* (2 *Bradf.*, 420,) it was held that it was competent to give evidence of the testator's declaration at the time of making the will, where a will is written, and there is no one to answer the precise description of the instrument.

In that case, the legacy was given to the testator's nephew, James Hornby, son of his brother Frederick; but it appeared that his brother Frederick had no son James, but that his brother James had a son named

STEVENS v. STEVENS.

Frederick, and parol evidence was given to show these facts, and was held admissible, so as to give the legacy to Frederick the son of James.

The Surrogate, in that case, uses this language: "It is undoubted that all extrinsic facts are admissible in aid of the exposition of a will, and it is competent by means of extrinsic evidence to place the court in the situation of the testator, so as to facilitate, answer and ascertain his intentions."

In *Williams v. Craig* (8 Cow., 246), it was held that evidence to show the intention of the testatrix is not objectionable on the ground of varying, or contradicting, any of the provisions of the will.

Such evidence goes to explain, independent of the will, the state of facts, of which the same is silent. In the same case on appeal (4 Wend., 443,) where a new trial was granted, chief Justice SAVAGE, (at page 451,) states the principle as follows: "Is this a legacy? If so what is the amount? There is not a word in the will explaining it. If therefore we are ever to understand it, we must seek its explanation from parol testimony. It cannot be received to give a construction to the language of a will, but to prove circumstances from which the court may draw the inference, or presumption."

In *Hine v. Hine* (39 Barb., 507,) parol testimony was held admissible to show that a subsequent advance was intended to apply upon a specific legacy. Mr. Justice ALLEN, (at page 512,) says: "Parol proof is competent not to define the terms of the will, but to establish the acts and intent of the testator, either in behalf of the plaintiffs, in rebuttal of the presumption of satisfaction, or of the defendants, in reply to the same evidence, in support of the alleged satisfaction."

I entertain no doubt that it is my duty, as well as province, to pass upon the question on this accounting,

STEVENS v. STEVENS.

of the liability of Mr. Melcher to the estate ; indeed, as the indebtedness is alleged against him, he being one of the executors, it seems to me the question of his liability must be passed upon, before the accounts can be settled. (See *Merchant v. Merchant*, 2 *Bradf.*, 432 ; *Gardner v. Gardner*, 7 *Paige*, 112.)

The authorities cited by the learned counsel for Mrs. Stevens, to this point, refer exclusively to the well settled doctrine, that the Surrogate will not assume the power to pass upon a disputed claim against the estate, upon the final settlement, and are not applicable to a case like this.

The effect of the clause of the will referred to, the testimony of Mr. Arnold, and the inventory of Mr. Stevens, upon the said liabilities of Mr. Melcher, are full of embarrassment. Several authorities are cited by the learned counsel for the executors, to show that the claims were satisfied, but these are all cases where there is a legacy to a debtor, and the effect of such liability of the legatee is adjudged. Such are *Williams v. Craig* (8 *Cow.*, 246), *Tillotson v. Race* (22 *N. Y.*, 127), *Hine v. Hine* (39 *Barb.*, 509).

In *Clark v. Bogardus* (2 *Edw. Ch.*, 387), it was held that the gift of a legacy to a debtor will not of itself amount to a release of the debt, provided the testator's intention is left doubtful ; there must be evidence clearly expressive of the intention, but it may be got at, *alioquinde*. At page 390, the Vice Chancellor uses this language : " There is another class of cases where chancery has relieved the obligor from the payment of his bond, upon clear evidence of the acts and declarations of a deceased obligee, and where they amount to a relinquishment of the debt, or to the want of intention to exact payment," citing, *Burn v. Godfrey*, 4 *Vesey*, 6 ; *Eden v. Smith*, 5 *Id.*, 350. But an examination of these au-

STEVENS v. STEVENS.

thorities does not fully sustain the principle enunciated, for they are cases of legacies directly to debtors, and to the same effect substantially, is the authority in 2 *Story's Equity Jurisprudence*, sec. 1,102.

The only authority to which attention has been called, which seems to sustain the principle enunciated is referred to in 4 *Vesey*, at page 10, where Lord MANSFIELD is said to have held, in *Barrow v. Greenough* (3 *Vesey*, 152), that a residuary legatee could not enforce the bond given to the testator, which the testator stated to the legatee, he did not intend the obliger should pay.

The case under consideration differs somewhat from all the cases which have been cited and considered, as the legacy referred to, charged with the \$86,000 liability of Mr. Melcher, was not to Mr. Melcher, but to his wife, and in that particular there seems to be an absence of parallel, and yet it is indisputable from the facts and circumstances in this case, that the testator did not intend to hold, or enforce the said claims against Mr. Melcher, but seemed to regard the estate to be given to his daughter, as though it were Mr. Melcher's, and that the amount mentioned in the will, her share of the estate, was to pay it.

The conditions referred to, that the charge should be made in case he left, surviving him, other children than Mrs. Melcher, was doubtless based upon the idea that his other children should not be charged with the result of Mr. Melcher's misadventure in respect to the Pacific Mail stock, but not to be charged to Mrs. Melcher, in case he left no other children, having equal claims upon his bounty.

In passing upon this question on this final accounting, the principles of equity seem to demand that the well-defined intent of the testator should control; and whether an action at law, by the representatives of the

tate, could be maintained to enforce the liabilities in question, against Mr. Melcher, is not a question to be passed upon in this proceeding.

It is clear that the claim has not been enforced, and there is no fund in hand received upon it; and it seems to me equally clear, that there is sufficient doubt of the liability to have justified the executors in omitting proceedings at law to enforce it, but whether they may be able to do so, at a future time, or not, is doubtful, and while I have a well-settled conviction, that under all the circumstances of the case, equity would intervene to prevent the enforcement, I do not think it proper that I should assume to pass upon the question.

With such consideration as I have been able to bestow upon the question, I am of the opinion that the said claims against Mr. Melcher, do not constitute assets of the estate.

I have examined section 13, (2 R. S., 84), which provides that any just claim which the testator had against his executor shall be included among the credits and effects of the deceased in the inventory; but whether it shall be so included, is dependent upon whether there is a just claim, and it is probable that the better practice would have been for Mr. Melcher to have stated the facts in the inventory, and left the question of liability to have been determined by future proceedings, but as it was not so included, and the counsel for Mrs. Stevens on this accounting, claims that it should have been, and that it should be adjudged to be an asset in the hands of the executors, I am not able to appreciate the force of the objection that I have no authority to pass upon that question.

Decree accordingly.

MINOR v. JONES.

NEW YORK COUNTY, HON. D. C. CALVIN, SURROGATE.—JULY, 1876.

MINOR v. JONES.

In the matter of the Estate of ANTHONY JONES, deceased.

The validity of a marriage is to be determined by the *lex loci contractus*. But the law of the domicile of the deceased governs the distribution of his personal estate.

No particular form or ceremony is required by the law of this State, to constitute a valid marriage.

A marriage between slaves, contracted in a slave state, before the Emancipation, with the consent of their masters, and according to the custom of marriage among slaves, and in a manner which if contracted within this State would be a valid marriage here, must when drawn in question in the courts of this State, be adjudged a valid marriage.

THIS was a motion to confirm a report of the late Surrogate Van Schaick, made by him, as referee, appointed by the late Surrogate Hutchings, which had been submitted to Mr. Van Schaick, after he succeeded Mr. Hutchings, as Surrogate, with the understanding that the whole question was open for consideration.

The facts in evidence were as follows : The intestate, Anthony Jones, died in the city of New York, April 15, 1873. He was a colored man, born in Virginia, a slave, the property (so called) of William Jones, who resided at the Wilderness, Spottsylvania County, Virginia. The deceased worked for Mr. Jones as a farm hand, and in gold mines, until he ran away, and was afterwards captured, and sold to one John Allis, from whom he escaped about 30 years ago, and came back to New York, where he continued to reside until he died, leaving property, in this city. Patsy Minor, a colored person born in the state of Virginia, was a slave, and belonged to Miss Lucinda Gordon, who married William Jones, the owner of Anthony Jones, the decedent; and Patsy there-

MINOR v. JONES.

by became the property of William Jones, and continued a slave, until liberated by the emancipation proclamation.

Anthony Jones and Patsy Minor met when they were comparatively young, resided in the same vicinity, and became intimate; he paid her considerable attention for six or seven years, and repeatedly asked her to marry him, and she at length consented to do so. They obtained the consent of their respective masters to marry, and finally came together, and lived and cohabited together as man and wife. This relation continued for about 13 years, by consent of their masters, and until Anthony Jones escaped to the North. During that period, they were faithful to each other in the relations of man and wife; had four children, all of whom died in infancy, except one, who now called himself Anthony Smith, and was one of the parties to these proceedings, and now resided at Yazoo City, Mississippi.

Anthony Jones and Patsy Minor were married according to the custom among slaves, and it was shown that the distinction was recognized among slaves, and by their masters, between such lawful connections, and illicit intercourse; and that those who cohabited without such marriage were regarded as disreputable; that during the period that they lived as husband and wife, they recognized and treated each other as such, and were so recognized by their masters and friends, and their children were recognized and treated as theirs.

Anthony Smith was born after his father escaped to the North, and the only recognition of him, by his father, was by a letter written to his mother from New York, in which he inquired about their child.

Before the alleged marriage with Anthony Jones, Patsy Minor lived and cohabited with a slave, by the name of James Willis, who was sent South by his mas-

MINOR P. JONES.

ter, and he never after that lived with her, but there was no evidence to show the nature of their relationship, whether by consent of their masters, or whether it was regarded as a marriage.

About eight or nine years after the escape of Anthony Jones, Patsy Minor, believing him to be dead, married Gabriel Minor, her present husband.

Anthony Jones, after his escape to the North, lived and cohabited with a certain woman, as his wife, who died before him, leaving no issue.

It was conceded by the respective counsel, that the times when Anthony Jones and Patsy Minor came together, and lived and cohabited as man and wife, the laws of this State declared that all marriages contracted, or which might be contracted where one or both of the parties was, or might be slaves, should be equally valid, as though the parties were free, and the child, or children of such marriages, should be deemed legitimate.

L. H. ARNOLD, *for public administrator.*

BENJ. WILLIS, *and others, for the next of kin.*

THE SURROGATE.—The questions to be determined in these proceedings, are, whether the alleged marriage of Anthony Jones and Patsy Minor, was such a marriage as should be recognized as valid and binding by the laws of the State of New York, so that Patsy Minor shall be entitled to a share of her husband's estate, as the widow; and whether Anthony Smith is legitimate, so that he is entitled to receive the residue of his father's estate, as next of kin, under the laws of this state.

It is admitted substantially by the respective counsel, that under the statute of Virginia, at the time when the alleged marriage of Anthony Jones and Patsy Minor took place, and they cohabited together, their union

MINOR F. JONES.

was not such a marriage as was recognized to be lawful by the statute of Virginia : hence, particular reference to these laws is not necessary for the purposes of this proceeding.

The new constitution of Virginia (Art. 11, p 100, of the Code of 1873), reads as follows : " The children of parents, one or both of whom were slaves at, and during the period of cohabitation, who were recognized by the father as his children, and the mother was recognized by such father as his wife, and was cohabited with as such, shall be as capable of inheriting any estate whereof such father may have died seized, or possessed, as though he had been born in lawful wedlock."

The Code also provides, at page 841, section 4, that " when colored persons before the passage of this Act shall have undertaken and agreed, to occupy the relation of husband and wife, shall be cohabiting together as such at the time of its passage, whether the rite of marriage shall have been solemnized between them, or not, they shall be deemed husband and wife, and be entitled to the rights and privileges, and subject to the duties and obligations, of that relation as if duly married by law," &c., " and all their children shall be deemed legitimate whether born before, or after the passage of this Act ; and when the parties have ceased to cohabit before the passage of this Act, in consequence of the death of the woman, or from any other cause, all the children of the woman recognized by the man to be his, shall be deemed legitimate."

The validity of a marriage is to be determined by the *lex loci contractus*. (2 *Kent's Com.*, 12 *Ed.*, 91-2, notes; *Smith v. Woodworth*, 44 *Barb.*, 198; *Medway v. Needham*, 16 *Mass.*, 157; *Putnam v. Putnam*, 8 *Pick.*, 433; *West Cambridge v. Lexington, Id.*, 506; 512, *Caujolle v. Ferrie*, 23 *N. Y.*, 139.) But the law of domicile of the deceased

MINOR v. JONES.

governs the distribution of personal property. (2 *Kent's Com.*, 12 *Ed.*, 426, 431, *note B.*; *Pub. Adm'r. v. Hughes*, 1 *Bradf.*, 125; *Bloomer v. Bloomer*, 2 *Id.*, 339; *Hegeman v. Fox*, 1 *Redfield*, 299.)

By chapter 44 of the laws of 1809, section 2, it is provided "that all marriages contracted, or which may hereafter be contracted, wherein one or more parties was, were, or may be slaves, shall be considered equally valid as though the parties thereto were free, and the child or children of any such marriage shall be deemed legitimate."

By this act, slaves in this state, or persons who may have been such, seem to be placed on the same footing as other citizens, in respect to the validity of their marriage; and hence, what would constitute a marriage between white citizens of this state, would constitute a marriage between those who are, or may have been, slaves.

The agreement of Anthony Jones, and the female now called Patsy Minor, to live together, as man and wife (certainly with the consent of their masters) and the continued cohabitation, as such, would constitute a marriage under the laws of this state, if they had been at the time, residents of the state of New York.

The law is well settled that no particular form or ceremony is required by the laws of this state to constitute a valid marriage; but marriage is deemed a civil contract to which the consent of the parties is deemed essential (*Clayton v. Wardell*, 4 *N. Y.*, 230,) and such marriage may be inferred by recognition, matrimonial cohabitation, &c. (*Matter of Taylor*, 9 *Paige*, 611; *Brinkley v. Brinkley*, 45 *Id.*, 184.) In the case first above cited, it is held that all that is essential to the validity of marriage, is a present agreement between competent parties, to take each other for husband and wife.

MINOR v. JONES.

It is urged by counsel for the claimants, Patsy Minor and Anthony Smith, that the proclamation of emancipation relieved the parties of all disability under the laws of Virginia, and that thereby their marriage was validated.

It cannot be successfully denied that the effect of the proclamation was to relieve all the slaves from the disabilities attendant upon their servitude, and that they became at liberty thereafter to contract marriage in the same manner as white citizens :—but it is a serious question whether by force of the proclamation the relations of the parties not recognized by the laws of Virginia as a marriage, could be made to constitute a lawful marriage as to the law of that state; and if not lawful as to the law of that state, it is also a serious question whether the rule that the validity of contracts must depend upon the place where they are made, is to be relaxed as to marriage contracts.

Story (*Conflict of Laws*,) in treating upon the subject of marriage, says, at section 108, “marriage is treated by all civilized nations as a peculiarly formed contract—it is in its origin a contract of natural law—in civil society it became a civil contract, regulated and prescribed by law, and endowed with civil consequences;” and in section 109, he says, “but it will be observed that marriage is a contract *sui generis*, differing in some respects from all other contracts—but it differs from other contracts in this, that the rights and obligations, or duties arising from it are not left entirely to be regulated by the agreement of parties, but are to a certain extent matters of municipal regulation.” “Marriage is a contract *sui generis* and the rights, duties, and obligations, which arise out of it are matters of so much importance to the well being of the state that they are regulated, not by private contract, but by public law of the state,

MINOR v. JONES.

which is imperative on all who are domiciled within its territories;" and at section 112, the author says: "In short, a marriage which is contracted according to the *lex loci*, will be valid all the world over."

"In expounding or enforcing a contract entered into, in a foreign country, and executed according to the laws of that country, regard will be paid to the *lex loci*, and the contract is evidence that the parties had in view the law of the country, and meant to be bound by it, but the parties who are domiciled here cannot be permitted to import into this country the law peculiar to his own case, which is in opposition to those great and important public laws, which our legislature has held to be essentially connected with the best interests of society."

This quotation is accredited to a learned Scotch judge, but commended by Chief Justice STORY. The general principle certainly is, that between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere. And the only exceptions to this rule, are stated to be polygamy and incest, as repugnant to good morals, and prohibited by Christianity.

In *Kelly v. McCarthy* (3 *Bradf.*, 7), it is held that the weight of authority is in favor of the supremacy of the *lex loci domicilii*, over the *lex loci contractus* after the husband and wife have removed to another state, as to property subsequently acquired.

In *Jackson v. Lervey* (5 *Cow.*, 397), it is held that the Act of 1809, above cited, was retrospective, and legalized all marriages and births of slaves before, as well as after, its passage; but of course the act could have no effect upon a marriage relation contracted or subsisting in another state; for the act itself, in its first section,

MINOR v. JONES.

makes provision for persons born slaves within this state. Story, at section 96, says that it has been solemnly decided that the Law of England abhors, and will not endure the existence of slavery within that nation, and that consequently, as soon as a slave lands in England, he becomes *ipso facto*, a free man, discharged from a state of servitude.

Independent of the provisions of the constitution of the United States, for the protection of the rights of masters, in regard to domestic fugitive slaves, there is no doubt that the same principle pervades the common law of the non-slave holding states of America, that is to say, foreign slaves would no longer be deemed such, after their removal thither.

It is clear that slavery and its attendant incapacities are opposed to the public policy of this state, as shown by the act of 1809, and the Revised Statutes, Title 7, Chap. 20, Part 1st, as amended by Chapter 247, of the Law of 1841, (*Lemmon v. The People*, 20 N. Y., 562.)

If, as has been repeatedly held, polygamous marriages, though valid in a sister state, will not be recognized in this state, by force of the comity existing between the several states, is it not equally logical that this state by reason of the comity existing between such states, will not be compelled to hold that the relation which existed in the state of Virginia, which was recognized by public sentiment, as a marriage, and would conform to our laws respecting the contract of marriage, is no marriage?

Is not the one case equally repugnant as the other, to the principles of freedom, justice, and good morals, recognized in this state?

In *Girod v. Lewis*, (6 *Martin, La. Rep.*) it was held that the marriage of slaves was void as to any civil effect resulting from such contract, because slaves had no legal

MINOR v. JONES.

capacity to assent to any contract. With the consent of their masters they might marry, and their moral power to agree to such contract or connection as that of marriage cannot be doubted; but whilst in a state of slavery such relation could not produce any civil effect, because slaves were deprived of all civil right. But it was further held that manumission gave to a slave his civil rights, and made the contract of marriage legal and valid by consent of the master and the moral assent of slave from the moment of freedom, although dormant during slavery; and produces all the effects which result from such contract among free persons.

If manumission by the master could produce all the effects which result from a legal contract of marriage between free persons, may it not be well contended that the emancipation of the slave by the sovereign power of the nation, legalized the state of marriage existing in a state of slavery?

Indeed it would be a reproach to the free and liberal spirit of our state constitution and laws, to hold that the emancipation of the slave intended to usher in a new and juster era, was powerless to effect the free and salutary result produced by individual manumission, in a state where servitude prevailed according to law and public sentiment.

In *Corbett v. Poelnitz* (1 Term R., 8), LORD MANSFIELD uses this language: "But then it has been properly said that times alter, and new customs and new manners arise: these occasion exceptions, and justice and convenience require a different application of those exceptions within the principles of the general rule."

The danger resulting from an effort on the part of an individual judge to conform the institutions and laws to his understanding of the improved spirit of the age, is fully appreciated. And the idea that the dictates of

MINOR v. JONES.

individual conscience may excuse disobedience of laws and constitution, should be repudiated, as hostile to every well-settled principle of justice and safety; but in the construction of law and constitution, I think it is the duty of a judicial officer to respect the advanced public sentiment of the present, when the public sentiment has assumed shape and consistency by a change of the constitution and laws of the land, and that in determining the force and effect of the relations existing under the constitution and laws, which recognized slavery, when the question has to be determined under a condition of things where servitude is repudiated, there should be an effort in good faith to give effect to such well defined change of public sentiment.

Applying these principles to this case, I am of the opinion that Patsy Minor is the lawful widow of Anthony Jones, deceased, and entitled under our law to one-third of the personal estate of her deceased husband and a dower interest in the realty; that her subsequent marriage to Minor, did not, and could not, affect the marriage relation between her and the intestate, especially as it appears that her marriage with Minor, was eight or nine years after the escape of the deceased, when she supposed him to be dead.

By the same reasoning, Anthony Smith is the lawful son and heir of the deceased; but he is more particularly so under the laws of Virginia, of 1865, which provide that wherever negroes have cohabited as man and wife, and shall have ceased to cohabit before the passage of that act, for any cause, all the children of the woman, recognized by the man to be his, shall be deemed legitimate.

This recognition was evidenced by the deceased's letter to his wife, making inquiry in respect to the child; and it is quite clear, that if the deceased had died an

MATTER OF HOWELL.

inhabitant of the state of Virginia, Anthony Smith would have been recognized as his legitimate child, and entitled to succeed to his father's estate; and if, by the laws of Virginia, he would be so recognized, it cannot be doubted that the courts of this state, under the circumstances detailed, should so recognize him.

The fact that these principles are invoked, not to divest any property or rights already vested, or acquired, but simply to confer such rights upon those who are entitled by the laws of nature, and common justice, should not be overlooked; and no technicality should be interposed for the purpose of bestowing the property in question upon the people of this state, rather than upon those who seem by every consideration of justice to be entitled to it.

As the result of the above conclusions, Isaac Smith, and Elizabeth Keaton, alleged surviving brother and sister of the deceased, are not the next of kin, and not entitled to any of the estate of the intestate.

Decree accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JULY, 1876.

MATTER OF HOWELL.

In the matter of the Estate of JOHN S. HOWELL, deceased.

Leave to issue execution should not be granted by the Surrogate on a petition which is not verified.

A verification by attorney, which does not allege any reason why it is not made by the party, nor indicate the affiant's means of information, nor the grounds of his belief, nor how much is stated on information and belief,—is not sufficient.

MATTER OF HOWELL.

THIS was a petition for leave to issue execution on a judgment obtained against the executors, on the merits.

The petition set forth that the executors had filed their account, and that by such account there were sufficient assets applicable to the payment of the judgment.

A preliminary objection was made on behalf of the executors, that the petition was neither signed nor verified by the petitioner.

M. E. FARNSWORTH, *for the executor.*

M. DALEY, *for legatee.*

THE SURROGATE.—The objection made presents an important question of practice, and deserves, it seems to me, careful consideration.

An examination of the precedents laid down by the several treatises upon the subject of practice in Surrogates' Courts, shows that petitions are uniformly made and verified by the petitioners.

It was not entirely clear whether sections 156 and 157 of the Code, which are confined to the verification of pleadings, are applicable to this court. By section 8 of the Code it is provided that the first four titles of the second part of the Code relate to actions in all courts of the state, which doubtless embraces the Surrogate's Court, but the term "*proceedings*," rather than *actions*, seems the appropriate designation of the jurisdiction of this court. It is quite clear however, that if section 157 does apply to the verification of a petition in this court, the verification of the petition in question does not conform to the requirements of that section, by setting forth in the affidavit the knowledge of the attorney, or the grounds of his belief on the subject, or the reasons why the verification is not made by the party.

MATTER OF HOWELL.

Again, if the sections referred to are not applicable to this court, then resort should be had to the practice prevailing in respect to such proceedings in a court of equity, anterior to the Code.

Barbour, in his *Chancery Practice*, vol. 1, page 44, states the rule to be that the bill must be verified by the complainant, or in case of his absence from the state, or for other sufficient cause shown, by the oath of his agent, attorney, or solicitor.

This ancient practice has not been followed in this case and I am not willing to relax the rule, which seem to be based upon good and sufficient reasons. In the verification to the petition in this matter, there is no suggestion of the absence, or inability of the petitioner to verify, nor is there any averment as to the means of the affiant's information, nor does it appear how much, or how little is stated on information and belief, nor is there any statement as to his sources of information, or the grounds of his belief. I must therefore dismiss the petition without prejudice to a future motion on proper papers.

Order accordingly.

SENIOR v. ACKERMAN.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JULY, 1876.

SENIOR v. ACKERMAN.

In the matter of the Estate of FRANCIS C. SENIOR, deceased.

The Surrogate has power, on proper cause shown, to remove an executor and guardian or one of several co-executors and guardians, if his circumstances are so precarious as not to afford adequate security for his due administration of the estate.

The fact that the testator knew the circumstances of the executor and guardian, is not a sufficient reason why the court should not exercise this power when necessary for the protection of the interests of beneficiaries under the will.

The proceeds of a life policy taken out by the testator, and by its terms payable to his children, are not assets of the estate.

But, the children being minors, the custody of such proceeds belong to testamentary guardians appointed by the testator.

Such fund should therefore be considered with the assets, in fixing the amount of security to be required from the executor and guardian as an alternative of ordering his removal.

The amount of security proper to be required from one of several co-executors, administrators or guardians is to be fixed in view of the actual amount of the fund and cannot be reduced by considering any arrangement between him and his colleagues by which they assume the exclusive control and responsibility of the trust.

THIS was a petition by Mary Emma Senior, one of the residuary legatees of the will of Francis C. Senior, deceased, to remove Jacob H. Ackermann, as executor and guardian.

The petition set forth that the will was proved June 26th, 1875, and that letters testamentary were issued to W. H. Hawks, Jacob H. Ackermann, and Oscar Frisbie, as executors and guardians of the petitioner, and "that the circumstances of Ackermann are so precarious, as not to afford sufficient security for his due administration of the estate."

That the assets that came into the hands of the executors exceeded seventeen thousand dollars.

That said Ackermann failed in his business, and became insolvent.

SENIOR V. ACKERMAN.

The executors named answered the petition that it was the wish and request of the testator before his death that in the event of his death, his children should live with the said Ackermann, but that they were living with Mrs. Lord, the testator's sister, who instigated their proceedings, that the executors named in the will were intimate friends of the deceased, and denied that his circumstance were precarious, &c., and alleged that the interest of the petitioner and the whole estate were outside and removed from the custody and control of said executor, and were not affected by his business affairs, or circumstances. That by the advice of Mr. Frisbie, one of the executors, and for many years counsel of the testator, the assets were turned over to the executor Hawks, and the entire management of the estate placed in his hands, subject to advise with the others; and that Ackermann has never had control over a dollar of the estate; and that the testator was well acquainted with Ackermann's circumstances when he made the will. That the testator left an insurance policy on his life, for the sum of \$4,263, four thousand of which had been safely invested, and that the inventory, including the \$4,000, was over \$8,000. That about \$3,000 had been paid for debts, and legacies. That the business of the testator, carried on by the executor, Hawks, had yielded a profit of about \$2,500; and that the estate, independent of the \$4,000 did not exceed \$7,000.

On this answer a reference of the whole matter was ordered. The referee in his report stated among other things that the executor, Hawks, had the exclusive control of the estate, and that the executors were appointed the guardians of the persons of the two infants, and not of their estate.

That the \$4,000 proceeds of the life policy which was taken by testator for the benefit of the daughters, and

SENIOR T. ACKERMAN.

payable to them, did not belong to the executors as such or as guardians, and should not be reckoned as part of the estate, and that the amount of assets in the hands of the executors, over and above the liabilities, was \$7,605.94.

Upon these facts the referee suggested that if deemed necessary by the Surrogate, the said executor, Ackermann, be required to furnish security to the amount of \$2,000 to \$2,500, which would be ample security. This proceeding was for the purpose of confirming the report of the referee, exceptions thereto having been filed by the petitioner.

The testator's will, after giving certain specific legacies, bequeathed the residue of his estate to his executors in trust to convert the same into cash, and if they thought best, invest the same, and pay the income to his two daughters, Mary E. and Elida F. until they arrive at the age of twenty-one years, respectively, then to be equally divided between them, if in the judgment of the said trustees, they were capable of taking care of, and managing the same; but if in their opinion they should not be, the testator directed his trustees, to keep the same invested, and pay the proceeds to them, and also authorized his trustees to continue his business at their option: and appointed the executors, guardians of said children.

O. S. ACKLEY, *for the executor.*

JOHNSON & CANTINE, *for petitioner.*

THE SURROGATE.—I am willing to pay all due respect to the maxim of the law, "whom the testator will trust so will the law;" nevertheless, when the interests of other parties are involved, they have the right to the protection of this court, though the testator may have been improvident in his selection of an executor. The language of section 8 (*2 Statutes at Large*, 73) is, "that if a person is appointed executor, and has become incompetent by

SENIOR T. ACKERMAN.

law to serve as such, or his circumstances are so precarious as not to afford adequate security for his due administration of the estate, the Surrogate may require such person to give a bond with surety like those required by law for the administrator;" and in case of failure, he may supersede the letters.

By chapter 359, of the laws of 1870, the Surrogate is authorized to revoke the letters, and discharge administrators, collectors, testamentary trustees, or guardians, from their trust, upon such terms and conditions as in his judgment may be proper for the security of the estate. It is clear, therefore, that the Surrogate has the power, on proper cause shown, to remove the executor and guardian in this matter.

The counsel for the executor and guardian sought to be removed, or of whom security is devised, claims that the Surrogate has no power to interfere with respect to the \$4,000, proceeds of the life policy, because it is payable to the infants and not therefore an asset of the estate. That it is not an asset of the estate I think quite clear, but by force of the testamentary appointment as guardian, it came into the hands of such guardian, and he is responsible for it. Section 3 (2 *Statutes at Large*, 157) provides that "as such guardian he shall take the custody and management of the personal estate of such minor, and the profits of his real estate," &c.

The counsel also seems to suppose with the referee, that if security shall be required, it should be upon the basis of the amount of assets in hand, over and above the debts. This is clearly erroneous; for if the fund is in his hand, security should be given to ensure its proper application, both to the payment of debts, and legacies; and by section 20 (of 2 *Statutes at Large*, 74), it is provided that the Surrogate shall require security by way of bond with sureties like those required of administrators; and by section 42 (2 *Statutes at Large*, 78), the

MATTER OF TEYN.

penalty of such bond shall not be less than twice the value of the personal estate, of which the deceased died possessed, and substantially the same security should be required of the guardian (2 *Statutes at Large*, 157, § 8).

The fact that there has been a mutual arrangement between the executors and guardians, that executor Hawks shall have sole control of the estate, under advice of the other executors, does not exclude the executor Ackermann from resuming control as executor and guardian at any time, by virtue of his appointment as executor and guardian, and he is charged with that responsibility.

The amount of the assets appears to be over \$9,000 in the hands of the executors as such, and the amount of funds in their hands, as guardians, seems to be about \$4,000.

Under these circumstances, I am of the opinion, that the executor named should give security by bond, in the penal sum of nineteen thousand dollars, and as guardian, by bond in the penalty of eight thousand dollars, and in the event of his failure to do so, let his letters be revoked.

Order accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JULY, 1876.

MATTER OF TEYN.

In the matter of the Estate of ANDREAS TEYN, deceased.

Executors cannot be allowed for expenditures made by them for a purpose not authorised by the will or the legal duty of executors,—e. g., to maintain a favorite horse of the testator, as long as he should live, although made by them in consequence of the verbal request of the testator.

Testator left a daughter aged four, appointing his executors, her guardians in case his widow should marry again; some years after his death, the widow married again, and the child thereafter resided with the stepfather.

MATTER OF TEYN.

Held, that the executors could not be allowed their payment to the stepfather for the ward's board and maintenance without proof of an agreement made by them to pay therefor.

If such an agreement were found, the law, (in the absence of a different stipulation), would imply an agreement to pay yearly; and the statute of limitations would begin to run as to each year's board, &c., from the end of the year.

Guardians cannot be justified by the consent of the ward, given during minority, in investing the ward's funds in their own business.

But the propriety of such investment should not be passed upon, on an accounting of the guardians, as executors; but should be raised on a decree requiring them to pay over the fund.

THIS was a motion to confirm the report of an auditor on the final accounting of the executors of the estate of Andreas Teyn, deceased, on objections filed by a legatee and daughter of the testator. The testator devised and bequeathed unto his wife all his real and personal estate, for her life, or during her widowhood; to apply the rents, income, and profits to her support, and the maintenance, and education of the daughter, to whom upon the death or marriage of his widow, he gave the entire estate; and he appointed the executors named, guardians of his infant daughter, in case of the marriage of his widow.

The testator died July 22d, 1855, when his daughter was four years old. In May, 1862, the widow married Edward Bergmann, with whom the daughter lived until her marriage.

The executors were cited to account, and filed their account, which was objected to by the daughter, and legatee, and the matter was referred to John D. Townsend, Esq., as auditor, before whom, during the proceedings, all objections to the account were withdrawn, except the objection to a charge for the board, keeping, and shoeing of a horse, for five years and nine and a half months, amounting to \$1,515, it being alleged that after the execution of the will, the testator requested the executors verbally to keep a favorite horse, as long as he

MATTER OF TEYN.

should live, and charge the expenses to the estate; and also the objection to a claim alleged to exist in favor of Edward Bergmann, the step father, for the support of the daughter under his charge, with the mother, amounting to \$2,840, but which had not been paid by the executors, or adjusted as such.

It was claimed also, on behalf of the executors, that the estate belonging to the daughter had been, by them as guardian, at the request of the infant, invested in some business enterprise.

The auditor disallowed the claims so objected to

C. P. HOFFMAN, *for the executor.*

C. F. HOPKE, *for creditors.*

THE SURROGATE.—I am of opinion that the finding of the auditor disallowing the claims is right, and should be sustained.

To establish such a charge on a verbal request, or recommendation of a testator would, it seems to me, open the door to very great abuse, and provide substantially that the force and effect of a will made according to law might be nullified by verbal instructions, or recommendation, thereafter made, and I am not willing to sanction any such dangerous interference with the deliberate will of the testator.

As to the alleged claim for board and support, of the daughter, by Mr. Bergmann, the fact that she continued in the family as a member thereof, creates no implication of an obligation to pay. (*See Williams v. Hutchinson*, 3 N. Y., 312; *Dye v. Kerr*, 15 Barb., 444; *Sharp v. Cropsey*, 11 Id., 224; *Conger v. Van Aernum*, 43 Id., 602; *Wilcox v. Wilcox*, 43 Id., 327; *Robinson v. Cushman*, 2 Denio, 149.)

A careful reading of the testimony upon the subject of the alleged agreement of the executors to pay for the

MATTER OF TEYN.

daughter's support, does not, in my opinion warrant me in finding, contrary to the conclusion of the auditor, that there was any such agreement; and it is clear to my mind that the question was not properly before the auditor to be determined, inasmuch as the account does not seem to have been regularly presented, and vouched for. If the question of liability of this estate is to be adjudicated upon, it should be upon the usual reference, where it would appear to be, to a considerable extent, barred by the statute of limitations, for if such an agreement should be found, the law would imply an agreement to pay at least yearly, and the statute of limitations would begin to run, on the close of each year. (*Davis v. Gorton*, 16 N. Y., 255.)

As to the allegation that the executors and guardians have invested the funds of their ward in their own business, under the consent of their ward, it seems to be sufficient to answer that she, while an infant, could not so consent; that such use of trust funds, is in plain violation of the law, and the duty of trustees.

But neither the auditor nor this court can properly pass upon this question, until it shall be raised on a decree requiring the trustees to pay over to their ward, the amount found due by this accounting.

The report of the auditor in the particulars above suggested is therefore confirmed.

Order accordingly.

GOULBURN v. SAYRE.

NEW YORK COUNTY—HON. D. C. CALVIN, SURROGATE.—AUGUST, 1876.

GOULBURN v. SAYRE.

In the matter of the Estate of DENIE SAYRE, deceased.

Practice in the New York Surrogate's court is to be assimilated as far as may be to that in courts of record.

A petition will be determined upon the papers presented, or referred to in the citation. The court will not consider other papers, though on the files.

THE petition verified January 31, 1876, alleged that the petitioner, Adelaide F. Goulburn was a creditor of the deceased; that letters of administration were granted June 16, 1874, to Mary Sayre, widow of the deceased, who in January, 1876, died, leaving certain assets of the decedent unadministered. That the personal estate of the decedent was of the value of \$6,000; and that he left James Denie Sayre, an alleged son, of full age, but left no other children, or descendants.

On this petition, a citation was issued requiring said son, and the public administrator, to show cause why letters of administration should not be granted to the petitioner, as a creditor.

On the return of the citation, James Denie Sayre filed an affidavit denying that the petitioner was a creditor, whereupon a reference was ordered to take testimony upon that subject.

Thereupon the petitioner, by her counsel, on an affidavit alleging that the order of reference was entered by the counsel of said James Denie Sayre, in violation of an understanding that it should be submitted for settlement, obtained an order to show cause why the order of reference should not be set aside and vacated, and argument be heard on the facts set forth in the petition.

On the return of this order to show cause, the order of reference was opened, and the parties were fully

GOULBURN v. SAYRE.

heard upon the merits of the petition ; counsel for petitioner claiming that the papers on file in this court, on a former reference, showed the fact that petitioner was a creditor.

On the part of the counsel opposed to the petition, it was insisted that those facts were not before the court, and that as the papers showing the same were not referred to in the petition, or citation, the motion must be heard solely upon the petition itself.

WM. EVERETT, and S. G. COURTNEY, *for the petitioner.*

IRA O. MILLER, *for the administratrix.*

THE SURROGATE.—All that appears before me upon the question whether the petitioner is a creditor, is the allegation in the petition that she is a creditor.

The practice of this court should conform substantially to that in courts of record, and when a motion is made, the moving parties should be confined to the points referred to in their notice or citation ; and it would be very unfair to expect that parties, when cited to meet one state of facts, should be prepared to meet entirely different or additional facts, because they may appear as part of the records of this court. There seems to be a somewhat prevailing notion on the part of many attorneys that this court is presumed in every proceeding before it, to know and to take notice of all papers and records filed and entered in this office. As well might a judge of the supreme court be required to take notice of the papers and records of the clerk's office, and to hear and determine a motion based upon any of them, which might be applicable to the case, without any reference to them in the notice of motion.

There is great propriety in confining parties to the facts set forth in the petition, or raised by motion ; indeed, no other rule can preserve the orderly administration of justice in this court.

TUCKER v. McDERMOTT.

This motion must therefore be considered on the petition, and the answer thereto; and it is clear that the petitioner has no right to letters of administration except she be a creditor, and that fact being denied, that issue should be first determined.

There must, therefore, be a reference of that question, unless the petitioner shall elect to discontinue these proceedings, and move anew on additional papers. But it is proper to remark that on examining the referee's report, in respect to the propriety of the administratrix giving security, the Surrogate does not assume to pass upon the question of the petitioner's status as a creditor.

Order accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—AUGUST, 1876.

TUCKER v. McDERMOTT.

In the matter of the Estate of JAMES UGLOW, deceased.

The Surrogate may, of his own motion, compel testamentary trustees to render an account.

He has power to settle an account so rendered; and for that purpose, the Surrogate of the city and county of New York may refer it to an auditor or referee.*

It is the uniform practice to pass upon and determine the state of an account rendered by an executor or administrator on the petition of a creditor or legatee, although there be no petition for a final accounting. But without a petition for a final accounting, a decree for distribution will not be made.

The desire to interpose a defence, such as the statute of limitations, is no excuse for refusing to refer a claim against the estate of a decedent; because any defence which could be interposed in an action may be interposed on a reference.

The fact that the court, in determining an action against executors, administrators or trustees does not charge them personally with the costs, is not conclusive in their favor, as to the allowance of such costs as paid by them, when their accounts are rendered in the Surrogate's court.

Where trustees, &c., are ordered to account at their own costs, the auditor to whom the account is referred has no power to charge the costs on

*Compare *Matter of Bitch*, post.

TUCKER v. McDERMOTT.

the estate; nor should the Surrogate do so, on a motion to confirm his report.

Where infants are concerned, the court will interfere to correct an error prejudicial to them, though acquiesced in by their special guardian and counsel.

Full commissions are not allowable to trustees on an accounting merely because, without the order of court or requirement of statute, rests have been made for the purpose of charging the trustee with interest. Compound interest should only be charged in case of gross delinquency or intentional violation of duty.

THIS was a proceeding to correct an auditor's report made on a reference of an account filed by testamentary trustees in the estate of James Uglow, deceased.

On the 16th day of February, 1874, the late Surrogate issued an order requiring the executors, John R. Flanigan and William McDermott, testamentary trustees under the will of the testator, to render an account of their proceedings as such, and that such accounting be at the personal costs and charge of such trustees, unless they should apply to the Surrogate for a final settlement, within ten days from service of the order.

On the 23d of March, 1874, the trustees filed their account, but failed within the ten days, to apply for a final account.

On April 6th, 1874, objections were filed by Gideon J. Tucker, Esq., guardian of William R. Uglow, and Kate P. Uglow, infants, and *cestuis que trust*, praying a reference of the account. On the same day, the matter was referred to Charles Price, as auditor, who, on the 25th of November, following, filed his report, to which exceptions were filed, on the 21st of December, 1874.

On the 11th day of January, 1876, the guardian filed a petition on behalf of his wards, setting forth the said order that the trustees' account, which was on motion of the Surrogate, the filing of the account, objections thereto, and order of reference, and the report of the referee, finding that there was a balance in the

TUCKER v. McDERMOTT.

hands of McDermott, trustee, applicable to the expenses of this accounting, &c., and for the support and maintenance and education of the infant children, \$1,155.92, and the filing of exceptions to said report. The petition further set forth that on the 10th day of February, 1875, the question of confirming the report was argued before the late Surrogate, but no order or decree had ever been entered.

The petition also alleged that the said trustees were lawyers, and that one of them, Flanigan, was responsible, and the other, McDermott, irresponsible—that McDermott had the entire charge of the trust funds, and had mixed them with his own funds, and kept no separate account—that no inventory was filed, until ordered by the Surrogate—that no final accounting had been had, and the estate had lost thousands of dollars by said McDermott's mismanagement, defending suits without sufficient reason, &c. The relief demanded by the petition was, that the auditor's report finding that the amount aforesaid in Mr. McDermott's hands was applicable to the expenses of said accounting, be disallowed, and that such expenses of said accounting be disallowed, and that such expenses be declared to be at the cost and charge of the trustee individually.

GIDEON J. TUCKER, *for the petitioner.*

GEORGE W. BLUNT, *for the executor.*

THE SURROGATE.—It is objected by counsel for the infants, and their guardian, that the Surrogate had no authority to grant an order of reference to the auditor, because there was no application for a final accounting and settlement—the order only requiring an accounting.

The cases of *Campbell v. Bruen* (1 *Bradf.*, 227), *Westervelt v. Gregg*, (1 *Barb. Ch.*, 469), and *Smith v. Van Kuren* (2 *Id.*, 473), are cited as authority for this objection.

TUCKER v. McDERMOTT.

Section 52, (of 2 *Statutes at Large*, 94.,) provides that executors and administrators, after the expiration of eighteen months from the time of their appointment, may be required to render an account of their proceedings upon the application of each person having a demand against the personal estate of the deceased, either as creditor, legatee, or next of him. Section 54 provides for the production of vouchers for debts and legacies paid, and expenses, and for examination of the executors or administrators making such payments, &c.; and section 55 provides that on settlement of an account, the executors and administrators may be allowed items of expenditure not exceeding \$20, for which no voucher is produced, if the item be supported by oath, &c. Section 58 provides that on settlement of such account, the executor or administrator may be allowed commissions in a prescribed amount. Section 60 provides for the final settlement of an executor's or administrator's account, on his application, in case he has been required under a prior section, to render the account; showing that there are, as held in the case of *Campbell v. Bruen*, *supra*, two classes of cases in which the Surrogate may proceed to settle the account after it has been rendered.

Chapter 782, of the laws of 1867, in its first section, provides that the Surrogate shall have power and jurisdiction to compel testamentary trustees and guardians to render accounts of their proceedings in the same manner as executors, administrators and guardians appointed by such Surrogate are now required to account.

It is clear therefore, that the Surrogate had the power under this section to require the trustees in this matter to account, and section 52, above cited, provides that executors and administrators may be compelled to account, on the motion of the Surrogate himself, and if no further proceedings could

TUCKER v. McDERMOTT.

be taken, to determine the correctness of the account so rendered, the authority to compel such an account would be valueless, and the proceeding an idle ceremony, affording no information or security to the parties interested in the accounting. While, in the absence of a petition or citation for that purpose, the Surrogate has no power to order, under a final decree, the distribution of the estate as upon a final accounting, yet it is apparent that in order to make the accounting on the Surrogate's motion effectual for any practical purpose, he must have authority to pass upon the correctness of the account, and for that purpose the *Revised Statutes* provided that the executor or administrator may be examined in respect thereto; and it is the uniform practice to pass upon and determine the state of the account rendered, when rendered on the application of a creditor, or legatee, and though there was no petition for a final accounting, I see no good reason why such accounting may not be as conclusive upon all the parties represented therein, as though it were final.

By chapter 359, of the laws of 1870, section 6, it is provided that in any accounting in the Surrogate's Court, or any other proceeding therein, the Surrogate may appoint a referee to take testimony as to the facts in relation thereto, to examine the accounts rendered to said Surrogate, to hear and determine all disputed claims, and other matter relating to said account, and to make a report thereon, subject to the confirmation of the Surrogate.

Under this section I entertain no doubt of the authority of the Surrogate to make the order of reference to the auditor in this matter.

By section 71, (2 *Statutes at Large*, 98,) it is provided that whenever an account shall be rendered, and finally settled, the Surrogate shall make a decree for

TUCKEY v. McDERMOTT.

payment and distribution of what shall remain among certain legatees, widow, and next of kin, according to their respective rights, and settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive, share, &c., showing that the decree of distribution is to follow the final settlement of an account.

There seems no reason to doubt that as this accounting is not final, no such decree can be entered in this case; yet in order to afford any practical advantage to any of the parties before the court in this proceeding, there should be a decree entered finding substantially the state of the account to the time when the same was rendered under the order initiating this proceeding.

I must, therefore, for that purpose, examine and pass upon the report.

The exceptions filed to the auditor's report, which seems to me to demand particular attention are:

First.—Those relating to the expenses attendant upon the prosecution of the claim of Mrs. Uglow, against the estate, which was presented and disputed, and respecting which an offer was made on the part of the claimant to refer under the statute, and a refusal given on the part of the trustees.

Second.—To that part of the report which finds that the balance in the hands of the trustees is applicable to the expenses of this accounting.

There is in this case a further question by the report as to the propriety of the charge for full commissions on annual rests, which, however, seems not to have been excepted to by the special guardian respecting the infants. The annual rests seem to have been made, because of the counsel for the infants demanding that the trustees should be charged in their account with interest, and that annual rests for that purpose should be made.

TUCKER T. McDERMOTT.

As to the first question raised, the referee seems to assume that the expenses which attended that litigation amounted to about \$1,800 : the special guardian excepts upon the same theory, but an examination of the testimony shows that the costs entered in the judgment were \$417.26, and there seems to have been nothing before the auditor, showing the amount of referee's fees in that action, which would, in case of a reference under the statute, probably have amounted to about the same, and from the evidence, it is impossible to determine how much should be charged to the trustees, by way of expenses unnecessarily incurred by reason of their refusal to refer.

Section 41, of (2 *Statute at Large*, 92), provides that no costs shall be recovered against executors or administrators to be levied on their property, or the property of the deceased, unless it appear that the demand on which the action was founded, was presented within the time required,—that its payment was unreasonably resisted, or neglected, or that the defendant refused to refer the same, according to the statute, in which case the court may direct such costs to be levied on the property of the defendant, or of the deceased, as shall be just, having reference to the facts that appear on the trial. On the part of the trustees, it is urged that they should not be personally charged with the costs of the action brought by Mrs. Uglow against the trustee on her claim, because they desired to raise the question of the statute of limitations, &c.

A sufficient answer to this suggestion is that any defence which may be interposed in an ordinary action to recover the amount of the claim may be raised on a reference under the statute, and it is occasion for surprise that the trustees in this matter who are reputable lawyers, should make such an excuse for refusing to refer.

TUCKER v. McDERMOTT.

(See *Redfield Surr. Pr.*, 296: *Tracy v. Suydam*, 30 *Barb.*, 110; *Dayton on Surrogates*, 389.)

It is also urged as a reason why the trustees on this accounting should not be charged with the costs of that action, that the court did not direct such costs to be levied on the property of the defendants, and that it was peculiarly within the province of that court to pass upon that question.

For the purpose of that action, it is true that it was for the court to determine the question whether the payment of the claim had been unreasonably resisted, or there had been a refusal to refer; but in that question the parties seeking to charge the trustees were not represented, and it may have been a question of indifference to the plaintiff in that action, whether the costs were charged upon the trustees individually, or upon the estate. Her neglect to apply to the court for such a direction cannot estop the objection in this proceeding; and if the amount were considerable, and reasonably ascertained, I should not hesitate to hold that the trustees might be charged personally with the costs in this action, or rather their account charging the estate therewith, be disallowed.

But the proof before the auditor does not sufficiently define the loss to the estate, by reason of the refusal to refer. The amount paid to counsel representing the trustees in that action may not have been greater than would have been charged for the like services before a referee under the statute.

A considerable proportion of the \$1,800 mentioned in the auditor's report, and in the exceptions filed there-to, is made of interest accruing upon the original claim during the pendency of the litigation, and under the circumstances of the case, I am not able to say that the auditor committed any error in his finding upon that

TUCKER v. McDERMOTT.

question. As to the second exception, I think it quite clear that it is well taken. The terms of the order provide that the accounting shall be at the expense of the trustees, and I know no authority that an auditor has, to change the terms of the order by his report, and it seems to me equally clear, that while that order stands, the present Surrogate should respect its provisions and that he has no power to set it aside, on a motion to confirm an auditor's report.

It may be urged against this construction of the order, that when the order was made, it only contemplated a formal rendering and filing of the account, and did not embrace an investigation respecting its correctness; but I have already suggested that the statute providing for such an accounting pre-supposed the authority of the Surrogate to investigate, and pass upon the correctness of the account; and in this case both logically and equitably the terms of the order should be followed, because the investigation of the account before the auditor has resulted in material additions to the charges against the trustees, and has shown that the account in several particulars was not correct.

The question as to the charges of compound interest, and allowing full commissions on annual rests, is one of embarrassment because of the peculiar manner in which this question is treated by the special guardian, and the auditor.

The auditor seems to base the allowance of full commissions upon the claim of the special guardian that interest should be charged to the trustees on the funds remaining in their hands, and the special guardian appears to have acquiesced in that finding, as he has interposed no exception to the auditor's report in that particular, the result of which is the charging of the trustees with \$200.33, as interest, and the sum of \$114.35

TUCKER v. McDERMOTT.

is credited to them by way of commissions, and an excess over ordinary commissions, amounting to \$597.79. If this state of things was acquiesced in, by the counsel acting as special guardian in these proceedings with full knowledge of its consequences, it would be embarrassing to interfere with the finding of the auditor in that respect, and yet where such injustice towards infants is apparent, it is the obvious duty of this court to correct the error, and set the infant claimants right; but I think that the auditor fell into an error when he supposed that because annual rests might be made, full commissions should be charged against the estate.

The earlier cases seem to hold that such commissions are only chargeable, in cases where annual rests are made under the *order of courts*, for the purpose of charging executors with interest. (*Vanderhuyden v. Vanderhuyden*, 2 Paige, 287; *Matter of Bank of Niagara*, 6 Id., 213; *Hosack v. Rogers*, 9 Id., 461; *Bennett v. Chapin*, 3 Sandf., 673; *Fisher v. Fisher*, 1 Bradf., 335.) But the more recent decisions authorize annual rests, and full commissions, in all cases where such accounting is made under the requirements of a rule of court, or by the provisions of a statute. (*Morgan v. Hannas*, 13 Abb. Pr., N. S., 361.)

It is clear however, that as yet there have been no annual rests in this account under the order of the Court for the purpose of charging the trustees interest, nor was there an accounting annually, pursuant to the statutes, and I see no reason for charging full commissions according to the auditor's report, nor am I able to perceive any good reason based upon the evidence in this matter for charging the trustees with compound interest. The charge of compound interest, is based upon evidence of gross delinquency, or an intentional viola-

GRAHAM v. VAN DUZER.

tion of duty. (*Redfield Surr. Pr.*, 400). The evidence before the auditor, in my opinion, does not warrant the finding that the trustees, or either of them, had been guilty of gross delinquency, or intentional violation of duty. In the respects above suggested, the auditor's report should be modified and in other respects confirmed.

Order accordingly.

NEW YORK COUNTY—HON. D. C. CALVIN, SURROGATE.—AUGUST, 1876.

GRAHAM v. VAN DUZER.

In the matter of the Estate of WILLIAM J. VAN DUZER, deceased.

The wrongful act of the executor or administrator in commingling trust funds held by the decedent with funds of the estate, cannot be allowed to prejudice the *cestui que trust*.

The decedent received for the price of property, sold by him as agent, a draft payable to his own order for a sum, of which part belonged to himself for commissions, and part to his principal. The executrix collected the draft, and mingled the proceeds with the moneys of the estate.

Held, that the principal was entitled to be paid in preference to creditors of the estate; and if need be, in preference to funeral expenses.

This was a petition for payment of a claim against the estate of William J. Van Duzer, deceased.

The question submitted in this matter, was, whether John. R. Graham, the petitioner, is entitled to a preference over the ordinary creditors of the estate, under the following circumstances.

The testator received a wagon of the petitioner, to sell on commission, with instructions to sell the same for

GRAHAM v. VAN DUZER.

\$250, and retain the balance over and above that sum, for his commissions.

A sale of the wagon was made by the testator, in his life-time, in payment for which he took a check or draft, payable to his order. This draft after his decease was collected by the executrix, and the proceeds were retained by her.

On the part of the claimant, it was urged that the wagon in question and the purchase price, to the amount of \$250, was a trust in the hands of the testator, and that he had no power by any act of his to divest the trust impressed upon it by the parties, and that the representative of the estate could take only the property belonging to the testator, and had no right or power to divest the claimant of his ownership of the money received for his property.

The claim was resisted upon the ground that the specific money having been deposited to the credit of the executrix, with other funds could not be traced by any ear mark, and that thereby the trust was changed to an ordinary obligation against the estate.

MCDONALD & CORNELL, *for the petitioner.*

F. J. MCKEE, *for the executor.*

THE SURROGATE.—In *Moses v. Murgatroyd* (1 Johns. Ch., 118) it was decided that property held in trust does not pass to the representatives of the trustee, but as long as it can be traced and distinguished it enures to the benefit of the *cestui que trust*. (See also *Kip v. Bank of N. Y.*, 10 Johns., 63.)

In *Van Alleyn v. Commercial American National Bank* (52 N. Y., 1), after an examination of several authorities, it is held substantially that the deposit of trust funds commingled with others does not divest the fund

GRAHAM v. VAN DUZER.

of its trust character, or prevent the *cestui que trust* from enforcing his right thereto, and in that case, Chief Justice CHURCH cites with approbation the decision of the English Court of Appeals in chancery, reversing the master of the rolls, in *Pennell v. Dessell* (4 DeGex, M. & G., 372) in which Lord Justice Knight BRUCE says, "When a trustee pays trust money into a bank, to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him, is one which as long as it remains due, belongs specifically to the trust, as much and as effectually as money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestui que trust*, it must be deemed specifically theirs. This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him money in every sense his own."

Lord Justice TURNER, in considering the same case, after stating that if trust funds be paid into a bank to the creditor of the trustee, it would belong to the trust, and not to the private estate of the trustee, makes this enquiry: "Then suppose the trustee subsequently pays in money of his own, not belonging to the trust, to the same account, would the character of the moneys which he had before paid in, of the debt which had before accrued, be altered?" The principle involved in this case is, whether a wrongful act by the executor, in commingling the trust fund with the others, can divest the *cestui que trust* of his right to the money as such.

The rights of creditors in whose interest the executrix resists a preferential claim of the *cestui que trust* are not affected by the enforcement of the rights of the *cestui que trust*, because neither the property nor its pro-

SMITH v. HOWELL.

ceeds ever belonged to the testator or to the creditors ; and to hold that by the commingling of the trust funds with others, the character of the trust was lost, and the fund made applicable to the payment of the ordinary creditors of the estate, would be to allow the representative of the estate, by his wrong, to vest the trust fund in the trustee or his representative ; a principle hostile to well settled law, and repugnant to every principle of justice, and I am of opinion that the claimant *cestui que trust* is entitled to be paid in full, the amount of his claim in preference to any ordinary debt of the estate, and if need be, in preference to funeral and other expenses.

Order accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—AUGUST, 1876.

SMITH v. HOWELL.

In the matter of the Estate of JOHN S. HOWELL, deceased.

If an executor or administrator has rendered an account showing assets applicable to the payment of a judgment, the judgment creditor, on petitioning for leave to issue execution, need not cite him to account.

If the assets have been materially reduced since the account was rendered it is for the executor or administrator to show the fact, distinctly, in answer to the petition. A mere allegation that the amount of cash appearing in the account has been reduced by payments, is not enough.

It seems that if the account has been finally settled, the Surrogate's leave is not necessary before issuing execution.

The Surrogate should not refuse leave to issue execution because an appeal by the executor or administrator is pending, unless the necessary security to stay proceedings has been given.

When a sufficiency of assets clearly appears, it is the duty of the Surrogate to allow execution to issue.*

* Compare *Wallace v. Swinton* (64 N. Y., 188) as to construction and effect of the statute.

SMITH v. HOWELL.

THIS was an application for leave to issue execution on a judgment recovered by the petitioner against the executors of the will of John S. Howell, deceased, for the sum of \$5,211.60, damages and costs, after a trial had on the merits, June 15th, 1876.

The petition set forth the recovery of judgment and that it remained it full force and unpaid; that the executors had filed their account, as such, in the Surrogate's office, by which it appeared that they had in their hands the sum of \$20,000, in securities, and about \$4,000, in cash, applicable to the payment of the judgment. On this petition, an order to show cause was granted and served.

By an affidavit of the attorney of the executors it was alleged that the action in which the judgment was obtained was begun in the testator's life-time, and was pending at his death, and thereafter was revived and continued against the executors. It had been twice tried, and on each time resulted in favor of the plaintiff. From the first judgment the executors appealed to the general term, where the judgment was reversed, and a new trial ordered, costs to abide the event. After the second trial, the costs of the former trial, as well as of the second, were taxed, and included in the judgment, together with five per cent. allowance. The executors appealed from the latter judgment, and the orders allowing costs and allowances, and this appeal was still pending, and likely to be determined in October next. They appealed in good faith, and were advised that the judgment would be reversed and that if they should pay the present judgment and a reversal of the same should follow, restitution could not be procured. The executors had securities in their hands, consisting of bonds secured by mortgage on real estate, except \$700 in bank; one of the mort-

SMITH v. HOWELL.

gages was now being foreclosed. The executors had filed their account, and it had been referred to an auditor, and the proceedings thereon were still pending, which account was prior to this application, and the petitioner was cited to appear thereon. The amount of cash appearing in their account had been reduced by payments. The executors did not file an undertaking on appeal, to stay the execution, because it was difficult to procure the requisite sureties.

H. E. FARNSWORTH, *for the executors.*

M. DALY, *for the legatee.*

THE SURROGATE.—On behalf of the executors, it is claimed that the proceedings are irregular,—*First*, because no citation has been issued, according to the statute, requiring the executors to appear and account; *Second*, because there has been no accounting, and *Third*, because the executors having rendered their account prior to this application, the application must be held to apply to section 32 (2 *Statutes at Large*, 90). Some confusion is created in attempting to harmonize that section with section 19th and 20th (2 *Statutes at Large*, 120).

By section 19, it is provided that a creditor who has obtained judgment against executors, or administrators, after a trial at law upon the merits, may apply to the Surrogate for an order against such executors or administrators, to show cause why an execution on such judgment should not be issued, and section 20 provides that on such application, the Surrogate shall issue a citation, requiring the executor, or administrator to account, and if upon such accounting there shall appear to be assets in their hands properly applicable to the payment in whole or in part of said judgment, the Surrogate may order such execution to issue for the amount so applicable.

This proceeding seems to be confined to a judgment obtained on a trial at law upon the merits, but evidently

SMITH v. HOWELL.

the accounting is to be made for the purpose of ascertaining whether there be assets in the hands of the executors, or administrators, applicable to such payment, and I see no reason why such an accounting should be made upon each and every application for such execution. If by the account already rendered there shall appear to be assets in hand so applicable, such a proceeding would seem to be absurd.

The objection that since the rendering of the account the assets may have been exhausted, or reduced by payment of other claims, cannot be sustained for the reason that it is not so alleged in the answering affidavit, and it affirmatively appears by the petition that such assets are in the hands of these executors. Section 32 (2 *Statutes at Large*, 90), above cited, provides that execution upon a judgment against the executors or administrators, shall not issue until an account of his administration shall be rendered and settled, or unless on an order of the Surrogate who appointed him, and this section I understand to apply to all judgment, whether entered on a trial on the merits, or by default, or otherwise, which seems to provide that in cases of accounts which have been settled, execution may issue without an order of the Surrogate, but in other cases it must be by order of the court.

It is not pretended that the account in this matter has been settled; therefore under the second alternative of the section, execution may be issued upon the order of the Surrogate in a "proper case."

As to the objections that an appeal has been taken and is likely to be determined in a short time, it is sufficient to say that the statute prescribes the mode of staying proceedings upon such appeal, and it would be a great hardship to allow an appeal to be taken without the security required for a stay of proceedings, and yet make that appeal serve the purpose of a stay.

SMITH v. HOWELL.

The counsel for the executors claims that under the circumstances of this case, the order ought to be refused, because it is discretionary, and cites the case of *Mount v. Mitchell* (31 N. Y., 356), as an authority upon that subject, but that authority does not sustain the proposition. It does hold that the decision of the Surrogate upon the question of sufficiency of assets shall be conclusive upon that point, and therefore no appeal could be brought to correct or reverse such decision; but it seems to me when a sufficiency of assets clearly appears, it is the obvious duty of the court to order execution to issue, for the language of the statute is, that if upon such accounting (not a final settlement of the account) it shall appear that there are assets in the hands of such executor or administrator, properly applicable to the payment in whole or in part of the judgment so obtained, the Surrogate *shall* make an order that execution be issued for the amount so applicable.

I see no good reason why execution should not issue in this case for the full amount of the judgment. I am unwilling to establish any such practice, as that an appeal without surety for the purpose of staying execution shall answer the purposes of such stay, especially when it appears that the appellants have available securities in their hands to nearly four times the amount of the judgment.

Order accordingly.

MATTER OF RITCH.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—SEPTEMBER,
1876

MATTER OF RITCH.

In the matter of the Estate of THOMAS B. RITCH, deceased.

One of several executors or administrators may be compelled to account, and the account be contested, by his co-executor or co-administrator.

The case of *Shumway v. Cooper*, 16 Barb., 556, explained and limited.

An account so rendered may be referred to an auditor.

The fact that the legatee's consent to the account, and object to the contest, is not ground for refusing to refer the account.

Wherever the Surrogate's court has power to compel the representative of an estate to account, it has implied power to pass upon the accuracy of the account, and to refer it to an auditor for this purpose.*

THIS was an application by one executor of the will of Thomas B. Ritch, deceased, to compel his co-executors to render an account of their proceeding as such. A citation was issued and served, and an account rendered and filed, to which objections were interposed; and an auditor was appointed.

An additional account was then filed, and the proctor for the legatee, appeared, and filed a retainer by the legatees, and a statement signed by them, that they are satisfied with the conduct of the executors, and ask the protection of this court against the expenses which will attend the accounting.

The petitioner alleged by way of affidavit that he was specially named as executor, and was requested to act by the testator as a disinterested person, and the testator exacted a promise that he would so act,—that the other executors were partners in business,—that two of the legatees were daughters of one of the executors, and all of them, under the influence of said executors.

* Compare *Tucker v. McDermott*, ante p. 312.

MATTER OF RITCH.

That the widow was a life tenant without business capacity,—that the other executors had treated the petitioner with disrespect,—had assumed the control of all the assets, and sought to obtain a power of attorney from him to take the absolute control of the estate.

A. DEWITT BALDWIN, *for petitioner.*

JOHN L. DAVENPORT, *opposed.*

THE SURROGATE.—It is objected by the proctor for the legatees that the petitioner has no standing in court for the purpose of these proceedings, particularly to contest the account, because not embraced within the provisions of 2 *Statutes at Large*, 97, section 63.

The language of that section is as follows: "Any creditors, legatees, or other person interested in the estate of the decased, or next of kin, or otherwise, may attend the settlement of such account and contest the same." The counsel for the legatee cited *Dayton on Surr.*, 487.

On examination of the statute and authorities, and such reflection as I have been able to give the subject, I think the construction put upon the section in question by the learned author named, is quite too narrow. Indeed at the bottom of the page, he is compelled to make an exception in favor of a widow, because she is within the equity and spirit of the section. Counsel also cite the case of *Shumway v. Cocper* (16 *Barb.*, 556), but an examination of that case shows that the objections to calling an administrator to an account in that case was, that the petitioner was an heir at law, not next of kin, and as the administrator took nothing of the real estate, the heir at law had no status to call him to an account in respect to the personality; and whatever is said in the opinion of the court, upon the subject of the authority of the Surrogate, under the section in question, was

MATTER OF RITCH.

clearly *obiter dictum*, and is not applicable to a case like the present.

In *Wood v. Brown* (34 N. Y., 337,) in discussing the power of a court of equity to entertain an action in behalf of one executor, against his co-executor, Mr. Justice MORGAN says: "In my opinion the Surrogate may interfere either at the suggestion of the co-executor, or of the creditors and legatees, in case the defendant refuses to perform any duty, which the law casts upon him, and which is necessary to be done, to preserve the estate." And in *Valentine v. Valentine*, (2 Barb. Ch., 530) it is held that the fact that property was to be held in trust by the executors until the death or restoration of the lunatic to sanity founded no objections to the settlement of the account of the executors, for the purpose of determining what the amount of the trust fund was. And see *Redfield Surr. Pr.* 245.

It is admitted by counsel, that the Surrogate had power to compel an accounting in this case, but he seems to assume that the rendering of the account exhausts the power of the Surrogate in the premises.

I have had occasion in a recent case to consider this question, and I am of the opinion that wherever this court has the power to compel a representative of an estate to render an account, that proceeding involves the authority to consider and pass upon the accuracy of the account and to refer it to an auditor to determine its accuracy, otherwise the power to compel an account would be absurd, and an idle ceremony, and the account might be imperfect, defective, or false, without any redress on the part of those interested in the account. But I am not left solely to the reasonableness of this doctrine, as it seems to be fully sustained by the able and persuasive reasoning of the Surrogate, in *Re Jones* (1 Redf., 263).

BOEDE v. BRUNER.

I entertain no doubt that the proceeding for the purpose of testing the correctness of the account rendered in this matter is proper, and should be enforced by this court, whether on the application of the co-executor or on the motion of the Surrogate

The order of reference to an auditor must stand, which should include also, the additional or corrected account rendered.

Order accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—SEPTEMBER, 1876.

BOEDE v. BRUNER.

In the matter of the Estate of HENRY BRUNER, deceased.

Under a will which directs the executors to convert into money the personalty not securely invested, and invest and keep it invested on bond and mortgage or public stocks,—they have not authority to loan on mere personal security, and at less than the lawful rate of interest. An executor who does so is liable, personally, not only for the safety of the principal, but for the lawful rate of interest.

Under a bequest of "the income" or real estate "after payment of taxes," assessments are not to be deducted from the income.*

It is not an insuperable objection to allowing a gross sum for disbursements made by the executor in managing the estate for a series of years, that he is not able to give in detail all the various items of charge.

The executor may be allowed for clerk hire necessarily incurred in the administration of the estate.

An unquestioned charge in the executor's account, for services rendered in settlement of the estate by the clerks of a firm of which the executor is a member, may be allowed to the executor, on condition of his producing the receipt of the firm.

Where three commissions are to be divided among more than three executors, under the act of 1863, no discrimination can be made among them, although one of them performed most of the labor.

*Compare *Gillespie v. Brooks*, *post.*, 349.

BOHDE v. BRUNER.

THIS was a motion to confirm the report of the auditor, and referee, Henry J. Cullen, jr., Esq., on final accounting in the estate of Henry Bruner, deceased. Exceptions to the report were filed by various parties on various grounds. The special guardian of the infants excepted, because the auditors did not charge Messrs. Bruner and Moore 7 per cent. interest, on the amount of a loan, and did not charge interest on a loan to Peter Bruner, from the date of loan, at 7 per cent. and did not charge the widow with certain assessments on the real estate.

The counsel for the executors, Bohde and Flanigan, excepted to an allowance of \$1,200, to Peter Bruner, for disbursements and expenses, from February, 1872, to May, 1876, and also to an allowance of \$350, paid his counsel, and to the division of commissions.

The counsel for the executor, Peter Bruner, excepted because the auditor refused to allow \$1,700 for the services of clerks, &c., being clerks of Bruner and Moore from 1872 to 1876.

OSBORN E. BRIGHT, *for the executor.*

WM. McDERMOTT, *for the widow.*

F. F. VAN DERVEER, *Special Guardian.*

R. F. ANDREWS, *for executor, Peter Bruner.*

THE SURROGATE.—As to the first and second exceptions, it appeared by the testimony that the firm of Bruner and Moore, composed of Peter Bruner, the executor, and one Moore, borrowed of the executors, on their note at three months, dated October 4th, 1870, \$15,000, and that they repaid, November 3rd, 1872, \$5,000, and that Peter Bruner borrowed on his note, May 26, 1871, \$10,000 on which it is claimed he gave certain securities.

On the first note, interest appears to have been paid to May 4th, 1873, at the rate of 4 per cent. which was the agreed interest of the time of the loan.

BOHDE v. BRUNER.

On the second note, interest at 4 per cent. was paid to 1873, and it appears that these loans were either made or approved by a majority of the executors.

On the subject of the third exception, the report of the referee finds that the executors and trustees should not have charged the widow with one-third of the amount of money paid for repairs to the real estate, —that they erred in charging her with one-third of the assessments upon the same, and with one-third of the insurance thereof, and that such deductions amount to the date of report, to \$11,302.02.

The will provides in its fourth clause, that the executors and trustees shall rent the rest of the real estate, not specifically devised, and from the rents pay the taxes on said real estate, and pay the widow one-third of the remainder of said rents during her life, and to pay insurances on the buildings, and apply the balance of such income, or so much as may be necessary, to the education, and support of her children. As to the first exception of the executors Bohde and Flanigan, it appears in the testimony that Peter Bruner, one of the executors who had chief charge of the administration of the estate, by leave of this Court presented a supplemental account for disbursements, expenses of carriage hire, car fare, &c., during the years mentioned above, amounting to \$1,200, which he testified was actually paid, and more than that amount, and that they were necessary disbursements. On cross-examination, he testified that he kept no account in detail of the disbursements, but gave in general terms the nature of the expenditures. He testified also that he paid his counsel, R. F. Andrews, Esq., \$350, as a retainer on the reference in this estate, believing that counsel was necessary. The referee in his report finds that the commissions should be calculated on the sum of \$285,598.65, and allows three commissions amounting to \$3,030.09,

BOHDE v. BRUNER.

each—to Peter Bruner one full commission, and to John R. Flanigan the same, and divides the other third commission between Bohde, and the widow equally.

As to the exceptions of the executor Peter Bruner to the disallowance by the auditor, of \$1,700, charged in the supplemental account for services of clerks, &c., in the employ of Bruner and Moore, from February 1st, 1872, to May 1st, 1876, it appears in the testimony that Peter Bruner had the principal management of the estate—that he and Moore were co-partners in business, and that the co-partnership presented an account of \$1,700 for services of their clerks rendered to the estate for the period mentioned, which was verified by Mr. Bruner, and in attending to the estate, and collecting the rents of various premises, and that he employed three clerks of Bruner and Moore to aid him in doing the business, and that their services were worth more than the amount charged, although they were paid wages by Bruner and Moore, and not by Mr. Bruner as executor.

The sixth paragraph of the testator's will provides that the executors shall convert the personal estate not securely invested, into money, and invest and keep the same invested upon bond and mortgage, or public stocks of the government of the United States, or of the state of New York.

Under these provisions of the will, it seems to me that the executors had no authority to keep any considerable proportion of the money resulting from the sale of the personal property in a Trust Company or Savings Bank, much less to loan it to individuals without the security contemplated by the terms of the will; indeed in the absence of the positive provisions stated, I am of the opinion that the executors were not authorized to loan the money on individual security, at any rate of interest, much less, at a rate less than 7 per cent.

BOHDE v. BRUNER.

It is no answer to say that the loan made by the executors in this matter, was to persons concededly solvent, for the law does not permit the exposure of trust funds to any such precarious securities, and when executors venture to loan trust funds upon such uncertain security, they must be held to have loaned it in violation of the law and are chargeable with the amount of lawful interest. But when such loan has been made in direct violation of the requirements of the will, it seems to me a self-evident proposition that the executors make themselves personally responsible not only for the fund itself but for lawful interest thereon.

In *Gilman v. Gilman*, (2 *Lans.*, 1.) the language of the will was quite similar to that of the will under consideration, and the excuses made by the executors for not investing the funds, according to the provisions of the will, were, that the parties interested objected to the investment in United States bonds, the difficulty of investing on bond and mortgages, and that they kept the money so that they could at any time pay over to the persons entitled. But the court held that none of those reasons justified the executors in disobeying the directions of the testator. If the limited state securities were considered objectionable, and if it was difficult to loan on bond and mortgage, there were other securities of states or cities, which were not subject to the same objections, and it was their duty to invest these moneys until they were wanted for payment of the legatees. See *King v. Talbott*, 50 *Barb.*, 453; 40 *N. Y.*, 76; *Redf. Surr. Pr.*, 250.

It cannot be said, nor does it appear in the proof, that the money loaned to Bruner and Moore, and to Bruner, could not have been invested in some of the securities named in the will, and I am of the opinion that the executor Peter Bruner should be charged 7 per cent.

BOHDE v. BRUNER.

interest upon the money so loaned, from the time of the loan, for he is chargeable with the knowledge of the terms of the will, and it is no answer for him to say that he loaned the money with the permission of the other executors at a reduced rate of interest. The law will presume that he received it with a knowledge that it was in violation of his duty as executor, as well as of the provisions of the will.

As to the question of the liability of the widow for repairs, assessments and insurance upon the real estate, to one-third of the proceeds of which, by the terms of the will, she was entitled, after the payment of taxes, I think the auditor and referee properly found that she was not chargeable, and that she had been improperly charged by the executor.

It is a mistake to suppose that she occupied the position of life tenant of the real estate mentioned, and therefore none of the authorities relied on, upon that point, by the special guardian, apply to this case.

In the case of *Doughty v. Stilwell* (2 *Bradf.*, 311), the language of the will gave to the widow the clear income of the testator's real estate, and it was held that clear income meant net income; and that the widow was therefore chargeable, not with the full amount of the assessments, in proportion to the income to be received by her, but with the annual interest on the amount of the assessments, and that the assessments should be charged against the remaindermen, but the will in question is specific, that the widow is to have one-third of the income of the real estate after payment of taxes. It is well held by the several authorities that the term taxes does not include an assessment.

In *Sharp v. Spier* (4 *Hill*, 76), Justice BRONSON, at page 82, says, "our laws have made a plain distinction between taxes which are burthens, or charges im-

BOHDE F. BRUNER.

posed upon persons, or property to raise money for public purposes, and assessments for city or village improvements which are not regarded as burthens, but as an equivalent or compensation for the enhanced value which the property assessed had derived from the improvement." (*Matter of the Mayor*, 11 Johns., 77; *Matter of Ford*, 6 Lans., 92.)

As to the exception to the allowance to Peter Bruner, by the referee, of \$1,200 for expenses, &c., as it is a question of fact, and the witnesses were before the referee, who could best judge of their credibility, and heard the details of the evidence, and as it must be apparent that in the management of so large an estate for over six years, very considerable disbursements of the kind charged in the account must have been made, though the executor is not able to give in detail the various items of charge, I see no such discrepancy between the proof, and the conclusion of the referee, as would justify me in interfering with him, in that respect.

I see no reason to doubt the propriety of the allowance of \$350, shown to have been paid to his counsel by the executor, Peter Bruner, in respect to the preparation and hearing of this accounting, though it may be proper on the question of allowances on signing of the decree, to consider that payment.

In considering the exceptions of the counsel for the executor, Peter Bruner, to the disallowance by the auditor of, \$1,700 charged for clerks, &c., it is quite evident that so large an estate, and in the condition which this estate was, under the care of this particular executor, necessarily required some assistance from an agent, or clerk, to give it proper attention, and the expense of such agent, or clerk is a proper charge upon the estate. (*McWhorter v. Benson*, Hop., 28; *Vanderheyden v. Vanderheyden*, 2 Paige, 287; *Cairns v. Chaubert*, 9 Id., 160.)

BOHDE v. BRUNER.

The difficulty in allowing the executor Bruner, for the amount of his charge inserted in his account, arises from the fact that the clerks employed were clerks of the firm of Bruner & Moore, of which the executor was a member, and the charge is made in the form of a claim presented by Bruner & Moore, and not passed upon by the executors as such ; yet as the services were rendered, and as there is no dispute either upon that question, or the real value of those services to the estate, it seems to me but right on this accounting; that it should be regarded as a credit to Mr. Bruner, executor, on his presenting a receipt for its payment to Messrs. Bruner & Moore. This certainly is equitable, and the only danger of allowing it to Mr. Bruner as executor, arises from the probability of the claim still being made by Bruner & Moore as co-partners against the estate, which will be sufficiently avoided by the receipt suggested.

By chapter 362, of the laws of 1863, section 8, it is provided, that if the estate shall amount to not less than \$100,000, over, and above all debts, &c., and there shall be more than one executor or administrator, each and every of such executors or administrators, shall be entitled to, and allowed the full amount of compensation that he would have been entitled to, if he had been sole executor, or administrator, provided that such compensation should not exceed the amount payable to three executors or administrators, and if there are more than three, what would belong to three should be divided among all in equal shares.

Under this Act, it is clear that no discrimination can be made in favor of any particular executor, where the estate exceeds \$100,000 ; in this case, therefore, the three commissions must be divided equally between the executrix, and executors.

The evidence in this matter, and the elaborate report

FAGAN v. DUGAN.

of the auditor shows that the estate had received great care and attention, as to the questions involved in this accounting, and do great credit to the auditor and counsel engaged, and it is with reluctance that I dissent from any of the conclusions of so intelligent and faithful an auditor, but on the most careful consideration of the questions raised, that I have been able to bestow, I am persuaded that both law and justice require that the report of the auditor should be modified, in the respects above suggested, and in others confirmed.

Decree accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE —SEPTEMBER,
1876.

FAGAN v. DUGAN.

*In the matter of the last Will and Testament of BRIDGET
DUGAN, deceased.*

To prove undue influence by duress or threats which will avoid a will it is not necessary to show that the duress was visible or physically exercised at the moment of the execution. It is enough to satisfy the mind of the court or jury, that the duress existed shortly before, and continued its domination over the mind at, the time of its execution. Such influence is usually effected by slow, adroit and covert process, manifested by numerous acts, each of which is trifling in itself, but all of which combined are potential and controlling; and it is the province of the court, from the evidence, to group and aggregate the several acts and circumstances with the opportunity and results, for the purpose of determining their effect on the testator's mind.*

* For recent cases on undue influence, as to requisite evidence on probate, see *Rollwagen v. Rollwagen*, 63 N. Y., 504; aff'g 3 Hun, 121; S. C., 5 Sup'm. Ct. (T. & C.) 402; and in *Surr. Ct.*, 48 How. Pr. 259; *McLaughlin v. McDevitt*, 63 N. Y., 213. Compare also *Baker's Will*, ante, p. 179.

FAGAN v. DUGAN.

THIS was a proceeding for the probate of the last will and testament of Bridget Dugan, deceased.

The will in a question bore date the 27th day of August, 1875, and the testatrix died on the 18th day of January, 1876.

The will gave and bequeathed to her son, Bernard Dugan, the lease of No. 183 Ludlow street, New York and the building thereon, with all her personal property, to discharge her indebtedness to her said son, and appointed him sole executor.

The deceased left two daughters, and three children of a deceased son, beside the son named as executor, in the will.

Hannah Fagan, one of the daughters, filed objections to the probate: that the instrument was not the will of the deceased; that the testatrix was of unsound mind, when the same was executed; that it was not executed and attested according to law; that its execution was procured by fraud, circumvention and undue influence, by Bernard Dugan, the executor, and that it was procured by fraud and coercion, by said Bernard Dugan, or some other person unknown.

ALFRED ROE, *for proponent.*

W. H. KING, *for contestant.*

THE SURROGATE.—A careful examination of the testimony of the subscribing witnesses to the will leaves no doubt upon my mind, as to the due execution of the will in question, unless it was procured by undue influence, or coercion. That question presents the only embarrassment involved in this contest; and for the purpose of its consideration, I deem it proper to state somewhat fully the facts testified to by the respective witnesses upon that subject.

Margaret Fagan, a daughter of the contestant, testi-

FAGAN v. DUGAN.

fied, that she was in the habit of visiting her grandmother frequently, and lived with her for a portion of the time, and that she said she had not made a will; that Barney, the son, was in the habit of quarreling with, and beating his mother, and four days before her death he threw a quid of tobacco in her eyes; that he threatened her a dozen times that he would kill her, or be the death of her; that he was anxious that she should make a will in his favor; that he would get up in the night-time and drag her out of bed; that she had seen him do it several times; that he used to beat her; that there were other persons occupying the house at the time, but had moved away; that he pulled her off the chair, pulled her cap off her head, and threw it in her face.

Ellen Haskin, one of the next of kin, testified that she was with the deceased about two weeks before she died, and remained over night, and that deceased told her that she had not made a will.

Hannah Fitzgerald one of the next of kin, testified that she saw her grandmother, the deceased, every day; that Barney quarrelled with his mother, and that she begged witness to stay with her, because her son would kill her; that she had often seen him take things, and throw at her; had seen him hit her with anything he could get hold of; saw him drag her out of bed, when she was sick, and she begged Miss Fagan to take her up stairs; that he had told his mother that if she did not leave him all she had, he would kill her; that she told witness that Barney had hit her in the eye; that she had stated to witness that she did not make any will; that she had made a will some years ago, but Barney did not like it; that she had no peace until she broke it. Hannah Dugan, a witness produced for the contestant, testified that Barney was quarrelsome with his mother; that he said he was afraid she would make a will in

FAGAN T. DUGAN.

favor of the witness, and if she did not make a will in his favor, he would kill her; that he frequently said so; that he dragged his mother out of bed by the hair of the head, spit in her face frequently; that he upset her in a rocking chair; said he would kill her.

Joseph Husson, Esq., attorney and counsellor at law, testified that he was called upon by the deceased to draw a will for her; that he drew one, she signed it; that he retained it at her request until some years after, when she called, and said she had no peace to her unless she broke that will; that her son Barney was making such a fuss about it; that she called to get it destroyed; that she was afraid of violence unless she put it out of the way; that he drew another will for her, and called upon her to execute it; she told him that she could not possibly execute it, unless Barney was out of the way; that she was afraid to execute it, unless it was in his absence; that she was apprehensive of her life if she signed the will; that that will provided for the equal division of her property among her children and grandchildren, the grandchildren taking the share of their parent; that this was in April, 1875; that will was not executed; that the will that was executed first, made no preference among her children: the property was divided equally among them.

James Fagan testified that he lived at deceased's house several years before her death; that on one occasion, deceased requested him to take her up to witness' house, and on being asked what was the matter, she said: "Barney will be killing me about the will, if I do not make a will in his favor," and that at her request he did take her up, and she stayed with them three or four months. She told witness she had been threatened by Barney unless she would make a will in his favor, and witness had seen him attempt to strike his mother, when

FAGAN v. DUGAN.

he was in the house. She told him that he struck her after witness went out; that he had heard him threaten her dozens of times.

Miles M. Dunton, a physician, testified in behalf of the proponent that he attended upon the deceased but discovered no marks of violence upon her, made no examination; that she never complained of any to him.

Bernard Dugan, executor, and sole legatee, testified denying all the allegations of violence, and threats; that he had loaned his mother \$1,700 that he had earned, upon the agreement that she should pay no interest, and that she should board and clothe him, and that she did so. He contradicts Mr. Husson as to the terms of the first will, and alleges that it gave all the property to him, except one hundred dollars to the grandchildren, and claimed that his mother took the will away because he had appointed him (Husson) trustee; that his mother instructed this will to be drawn as it was, because she owed him, and wanted to make a settlement with him, and because she had no money to pay him. It appears that the testatrix was about 83 or 84 years of age when she died.

The subscribing witness, James G. Murphy, testified that he drew the will under the direction of the testatrix; that he was a clerk in the register's office, and had no acquaintance with the testatrix until the day he saw her upon the subject of this will; that he received instructions as to the terms of the will in the *presence of Barney Dugan, and that he was present at its execution.*

The testimony in this case presents the most extraordinary exhibition of brutality on the part of Bernard Dugan toward his mother, if it is to be credited, and it is certainly difficult to believe that the witnesses Margaret Fagan, Ellen Haskin, Hannah Fitzgerald, Hannah Du-

FAGAN v. DUGAN.

gan, and James Fagan all testified falsely in respect to the treatment by him of his mother, more especially as a reputable attorney, Mr. Husson, was told by the testatrix that she had no peace unless she broke the will, that Barney was making such a fuss about it that she had come to destroy it; that she was afraid of violence unless she put it out of the way, and that a subsequent will, making an equal distribution of her estate was not executed after several attempts, because of the presence of her son Bernard.

Other circumstances deserving consideration are the fact that her attorney was not called upon to draw the will in question, but a stranger, and a layman; and that the testatrix had two sisters living, and the children of a deceased son, all of whom would seem to have equal claims, at least, upon her bounty; that she destroyed the first will under the circumstances and for the reason stated by her, and that she failed to execute the second will, containing similar provisions to those in the first, for the reasons stated by her to the witness Husson. It seems to me sufficiently shown that she was at these times so intimidated by the threats, and ill treatment of her son, that she was coerced into destroying it and into desisting from the execution of the second will; and the only difficulty there is in determining whether the will in question was the free act and testament of the testatrix arises from the fact that it is necessary to establish the fact of coercion and control, at the time when the will was executed.

In *Gardiner v. Gardiner* (31 N. Y., 155), Justice DAVIES after reviewing several authorities states the results of these authorities as follows: "That undue influence to avoid a will must be such as to overcome the free agency of the testator, at the time the instrument was made; it must be a present constraint operating on the

FAGAN v. DUGAN.

mind of the testator at the time of the testamentary act," as to which he cites the following authorities: *Earl Sefton v. Hopwood*, (1 *Foster & Finl.* 578); *Dean v. Negley* (41 *Penn.*, 312); *Eckert v. Flowry* (43 *Id.*, 46.)

From an examination of the latter case—which is cited as authority for the principle that the undue influence to avoid the probate of a will must be a present constraint operating on the mind of the testator, at the time of making the testament,—it appears that testimony was given, under objection, of the acts and declarations of the testatrix after the execution of the will, also of the conduct of the person alleged to have exercised the undue influence, all subsequent to its execution, and that no evidence was produced of facts or occurrences, tending to produce undue influence or duress, previous to the execution of the will in question. It is certainly no authority in such a case as this. So in the case of *Gardiner v. Gardiner*, above cited, there was no evidence of any duress, or of undue influence. It only appeared that the testator was influenced by affection or esteem, to make the will that he did, and the point discussed as to the time when the influence must operate, in order to determine its effect upon the mind, was not necessarily before the court. Undue influence may be inferred from circumstances (*Marvin v. Marvin*, 3 *Abb. Ct. App. Dec.*, 192; *Lake v. Ranney*, 33 *Barb.*, 49).

In *Seguine v. Seguine*, 3 *Keyes*, 663, the head note of the case is, "undue influence must be an influence exercised by coercion, imposition or fraud, and not such as arise from gratitude, affection, or esteem, and its exertion upon every act must be proved; it will not be inferred from opportunity, and interest," but in that case Mr. Justice WRIGHT says, "but the case is barren of evidence of any direct influence exercised to procure the will."

FAGAN v. DUGAN.

By the language of the various authorities that the coercion, duress or undue influence, must be a present constraint operating on the mind of the testator, in the very act of making the testament, (*McMahon v. Ryan*, 8 *Harris*, 329), I do not understand that to prove that the influence was present at a particular time, it necessary to show that the duress was visible, or physically exercised at the moment of the execution, but that there must be such evidence as will satisfy the mind of the court or jury, that the duress existed shortly before, and continued its domination over the mind of the testatrix at the time of execution.

To hold otherwise would render it practically impossible to defeat the probate of a will, the execution of which was procured by the undue influence of a shrewd and scheming person, for it would be apparent that any undue influence or duress, exercised at the moment of execution, in the presence of the subscribing witness, would defeat the fraudulent purpose of the party seeking to influence or coerce the testatrix.

It would be absurd to expect that such undue influence, fraud or duress, would be exerted visibly in the presence of disinterested spectators, who would be likely to reveal them, and thus defeat the unlawful scheme.

Such fraudulent results are usually attained by slow adroit, and covert processes manifested by numerous acts, each of which is trifling in itself, but which when combined are potential and controlling; and it is the province of this court, from the evidence, to group, and aggregate the several acts and circumstances, with the opportunity and results, for the purpose of determining their effect upon the testator's mind. It seems to me that the proof in this case showing the execution of a former will for the benefit of all her children by the testatrix, its destruction under threats by the

GILLESPIE v. BROOKS.

sole beneficiary of this will, his violence and threats producing such fear upon the testatrix that she dare not execute a second will making similar provisions, his repeated threats to kill her if she did not make the will and give him all of her property, and her statement of her fears of such personal injuries, all combine to establish the fact, that at the time when this will was made by the testatrix, she executed it under the duress of her son, the sole beneficiary under the same; and this conclusion is made more probable, when we consider that she was a very old lady, infirm in health, and unprotected by any other inmate of her apartment.

Order accordingly, denying the probate on the ground of undue influence and duress.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—OCTOBER, 1876.

GILLESPIE v. BROOKS.

*In the matter of the Estate of ALFRED K. MOUNT,
deceased.*

Executors and testamentary trustees with general power to invest and reinvest a fund, are bound to invest it within a reasonable time, in securities of the class sanctioned by the court.

If the assets left by the testator consist of stocks of private corporations, they should sell them and duly invest the fund within the eighteen months allowed for settling the estate.

If they neglect to do so, they are personally liable for loss by the depreciating of such irregular securities left by the testator, after the expiration of the eighteen months.

Where some of such securities maintain full value or increase in value, and others depreciate, the *cestuis que trustent* may elect to accept the investment as to the former, and claim the chanced value and income therefrom, and still reject the latter, and hold the trustees chargeable with the loss thereon.

GILLESPIE v. BROOKS.

- The trustees are liable in such case, although they acted in good faith. The fact that the trust is not terminated, does not preclude the exercise of the election by the *cestuis que trustent*.
- The right to have an account of the trust taken and settled, includes a right on the part of all the beneficiaries who are *sui juris*, to elect as to the irregular investments.
- Executors or administrators who, without a Surrogate's order, compound debts due the estate which were inventoried as worthless, are not chargeable with more than they have collected, unless there is evidence of bad faith or serious error of judgment.
- They have power to compound claims, independent of the statute which gives additional protection when they act under leave of the Surrogate.
- Debts due the decedent to a large amount were inventoried as worthless, and the executors, under the advice of the decedent's bookkeeper who was familiar with the circumstances, did not attempt to collect them by suit. *Held*, that they were not chargeable with such debts, in the absence of evidence that the debts might have been collected.
- Executors are not bound to require vouchers from creditors whose claims are attested by the decedent's books of account and by personal information of their correctness from his bookkeeper.
- So information from the widow that a certain sum is due from the decedent to a servant, is sufficient to justify the executor in making payment without a voucher.
- All ordinary taxes, assessments and interest on incumbrances, and charges for ordinary repairs, must be paid out of the income by the life tenant.*
- In the case of permanent improvements to the estate, the life tenant must be held liable for the interest and the remainderman for the principal.
- An executor may be allowed a demand in his own favor against the decedent, if it be not barred by the statute, though it be presented for the first time during a contest raised by the legatee against his account, and though he testifies that he interposes it only in consequence of such contest.
- Mucilage being a substance sufficiently tenacious to adhere, and capable of receiving and retaining an impression, a bit of paper affixed with mucilage and stamped on with a permanent impression, is good as a common law seal.†
- The mere fact that the executor's retention of irregular securities has caused loss to the estate, is not ground for refusing them commissions.

* Compare, *Bohde v. Bruner*, ante, 333; *Burleigh v. Center*, 1 Sup. Ct., (J. & S.) 441; *Grannis v. Cook*, 3 Sup'm. Ct. (T & C.) 299.

† As to necessity of impression, see *Van Bokkelen v. Taylor*, 62 N. Y., 105; rev'g 2 Hun, 138; S. C., 4 Sup'm. Ct. (T. & C.) 422.

GILLESPIE v. BROOKS.

Costs of an executor's accounting may be allowed to them out of the estate, although the contest has resulted in charging them with losses, &c., not credited by them in their account.

THIS was an accounting by the surviving executors, and trustees of the estate of Alfred R. Mount, deceased.

Objections to the account were filed by the three daughters, Mrs. Gillespie, Mrs. Carrol, and Mrs. Allen, and the matter was referred to the late Mr. Van Schaick as auditor and referee, and a large amount of testimony was taken, upon the questions involved in the accounting before the referee, but no report was ever made; and the case was argued before the present Surrogate, and submitted to him, on the account, objections, and testimony.

The testator died July 17th, 1864, leaving a last will and testament which was admitted to probate, August 6th, 1864, and letters testamentary were issued to Elisha, and Daniel H. Brooks, and to Mrs. Hannah B. Mount, the widow, who were by the will, appointed executors and executrix.

Daniel H. Brooks, and Elisha Brooks, two of the executors, were made trustees.

The testator left him surviving, his widow, who died, July 3, 1870, and four children, Gilbert H. Mount who died without issue February 18th, 1875, Mary Elizabeth Carrol, Hannah G. Mount, now Gillespie, Helen B. Mount, now Allen.

By his will the testator bequeathed \$5,000, in trust, for Gilbert H. Mount, for life, remainder to his sisters, and the issue of such as were dead, which on his death was distributed by the trustees, according to the will; \$5,000 in like trust for Mrs. Carrol for life, remainder over to her issue, if any; if none, then for her surviving sisters, and the issue of such as might be dead; \$5,000 in like trust for Hannah G. Mount, now Gillespie, for

GILLESPIE v. BROOKS.

life, remainder over, as in the case of Mary Elizabeth; \$5,000 in like trust for Helena Brooks Mount, now Allen, for life, remainder over, as in the case of the last.

He also gave the use of certain premises to his sisters, Mary Mount and Elizabeth Rundlett, for life, remainder over to testator's children—also \$3,000 in trust for his said sisters, for life, remainder over to said children.

The residue of his estate he gave in trust, to apply the income to his widow, during her life, to be safely invested, with power to change the investments as the trustees might deem proper, and upon the death of the widow, the trustees or the survivor of them were directed to take of the residuary fund of \$20,000, and invest the same, and to devote the interest and income thereof, in their discretion, in monthly payments, to the use of the said Gilbert H. Mount, during his life, but in case the residue of the said residuary estate, after deducting \$20,000, should exceed \$100,000, then a fourth part of the excess was directed to be added to the \$20,000, subject to the same trust, and on his death, the sum so held in trust for him, and the income thereof, were directed to be distributed in equal shares among his surviving sisters, and the issue of any deceased sister, *per stirpes*, and also upon the decease of the widow, the balance of the residuary estate was directed to be divided into three equal parts, and each part to be held in trust by his said trustees, and the income thereof to be applied to each of the three daughters during their lives respectively, and on the death of either, to be divided among her issue, if any.

The objections filed, so far as material to the decision, were as follows:

First.—To the sale and the amount realized there-

GILLESPIE v. BROOKS.

by, of bank stock, railroad, insurance stocks, and promissory notes.

Second.—To certain discounts amounting to \$1,111.25 on certain notes, assets of the estate.

Eighth.—That the trustees state in their account that the inventoried value of 328 shares of the Tradesmen's National Bank was \$10,886, whereas in fact it was \$13,448, and that 280 shares of the American Exchange Bank was inventoried at \$23,745.26, whereas in fact it was \$23,920.

Elerenth.—That the assets consisting of stocks, were not sold and converted, and the proceeds invested in securities permitted by law, within a reasonable time after the death of the testator.

Twelfth.—To the trustees crediting themselves the inventory price of the bank, insurance, mining and manufacturing stocks, because they have depreciated since the inventory, and the trustees are liable for the loss because they unlawfully retained them.

Thirteenth.—That they held securities contrary to law, and the provisions of the will, and are thereby chargeable for the loss.

Fourteenth.—To the items of debts, not collected.

Serelenth.—To all the charges made for payment of taxes, insurance and repairs of the Elizabeth property, also to payments made to Bessie Murphy, of \$1,065.26; Ann Murphy, \$315 for services rendered, also to payment to William Endall, of \$925.16, because no vouchers were furnished. On the argument it was also claimed that the promissory note of the deceased, under seal, should not be allowed, because not proved and outlawed; that no commissions should be allowed, and that the trustees should be compelled to pay the expenses of this accounting, because of their neglect of duty, and among others, that they failed to collect

GILLESPIE v. BROOKS.

debts, that they paid debts without inquiry as to their validity, took no receipt, mixed the trust funds with their private funds, used the trust funds in their business, failed to sell insurance stocks, kept no private account, trumped up the note mentioned, falsified their accounts, and failed to file their account for ten years, &c.

The following facts appeared by the inventory, and the testimony taken. There were various bank, insurance, and other stocks at the time of making the inventory, July 20th, 1865, estimated at the sum of \$71,882.20, and these stocks were held by the executors until after considerable progress had been made in the accounting. In consequence of the objections to the retention of these stocks by the executors, they were on the 3rd of February, 1875, sold at public auction, and they then realized the sum of \$67,406.13. The estimated value of these stocks, in February, 1866, eighteen months after the issue of letters testamentary, amounted to \$70,194.80. A considerable decrease in the value of several insurance stocks resulted from the great fire in Chicago, and some of the stocks were thus rendered entirely worthless. The executors paid the respective legatees the income of the estate according to the provisions of the will, and the aggregate amount of the income from the stocks from February 1st, 1866, to February 1st, 1875, was \$49,478.17, equal to very nearly eight per cent. upon the valuation eighteen months after the issuing of letters, amounting to an excess of \$11,572.98, over and above the income thereon, computed at 6 per cent. If the amount of the valuation of the stocks, eighteen months after the issuing of the letters, had been invested in United States securities at 5 per cent, the income would have been \$40,983.99, or \$8,494.81 less than was actually realized, and if invest-

GILLESPIE v. BROOKS.

ed in such securities at 6 per cent. the income would have been \$45,122.07, or \$4.356.10 less than was actually received.

Several notes belonging to the estate which were inventoried as worthless, were collected at a discount by one Mr. Endall, who was paid 10 per cent. for collecting, under an arrangement for this purpose, which amounted to \$1,112.49.

The testimony also showed that in the account rendered by the executors, a mistake occurred in crediting the estate with 328 shares in the Tradesman's National Bank, at \$10,886, whereas it should have been \$13,448, showing a difference of nearly \$3,000; and a like error in crediting 208 shares of the American Exchange National Bank, at \$23,745.26, whereas it should have been \$23,920, making a difference of \$174.74, also a mistake in crediting the executors for 20 shares of the Home Fire Insurance Company's stock, at \$8,000, whereas it should have been credited at \$2,000, showing a mistake of \$6,000.

The counsel for the legatees claimed that the executors were liable for a failure to collect various notes amounting to over \$50,000, which were inventoried as worthless because they made no effort to enforce them by suit.

Upon this subject the evidence showed that a former clerk of the testator, who was familiar with the assets, and the various securities, had charge of the collection of the notes, and made efforts to collect them, but not by suit; that the executors examined the accounts, and made inquiries of him in respect to the collectability of the same, but there is no evidence in the case showing that any securities not collected were collectable.

It is also objected by the same counsel, that a very large amount of indebtedness, to wit, \$191,944.16, was

GILLESPIE v. BROOKS.

paid to creditors of the deceased without any knowledge of the correctness of the claims.

Upon this subject the testimony showed that the indebtedness appeared upon the books of the testator, and that the testator's clerk understood the claims, and their genuineness, and advised the executors in respect to them.

The testimony also showed that the executors paid Bessie Murphy, \$1,065.26, for services rendered for testator, and for which he was indebted in that sum, at the time of his decease; also to Ann Murphy, \$315, for like services, without any vouchers, but on information furnished to them by Mrs. Mount, the widow.

It also appeared that the executors paid William Endall \$925.16, the allowance of which was objected to by counsel for legatees, on the ground that it was for services, and was paid without any voucher; but the testimony showed that Mr. Endall had an arrangement with the testator, by which he was to receive 10 per cent. upon the profits of deceased's business, over and above \$20,000 per year—that his statement of that agreement was corroborated by that of Mrs. Mount, and that the sum above stated was paid under that agreement.

Another item objected to, was as to the sum of \$744.20 paid to Mrs. Mount, which the executors testified was an over payment, and which would seem to be properly chargeable as against her estate, and not as against this estate.

The testimony shows that the executors paid on account of taxes, insurance, assessments, repairs and improvements on the Elizabeth property, the sum of \$5,138.29, it being upon premises by the will devised to the testator's sisters, Mary Mount and Elizabeth Rundlett, during their joint lives, and the survivor of them, to use and occupy.

GILLESPIE v. BROOKS.

These expenses appeared to have been incurred under the authority of the widow, to the amount of \$2,100, and apparently with her knowledge as to the balance. It appeared also that prior to the decease of the testator, his sisters had occupied the same premises for a considerable period, testator attending to the repairs, paying taxes, &c., and that the sisters had no other means of support, except the use of the premises, and the legacy given to them in the will ; that the widow said to the executors that she was willing the repairs should be made, as she considered, virtually by her, and this she said at the time when she was examining the executors' account, where she had been charged for carpenter work, plastering, masonry and laborers. The account thus referred to was an account, where these charges were made against the income of the estate for that current year. The expenses were a thousand dollars larger than she expected to pay, and she made an agreement with her nephew, Mr. Rundlett, that he should consider that he owed her a thousand dollars, and he should pay her interest at 7 per cent., and that he did pay on account of such interest \$100 ; that the obligation for payment of the \$1,000 was not in writing, but the hundred dollars was credited to her personal account.

The executors gave in evidence a promissory note bearing date December 29th, 1862, under seal, for \$4,982.57, payable one day after date, at 6 per cent., to the executor, Elisha Brooks, or order.

It appeared in evidence that this note was given for a prior note, of the same amount, which prior note bore no interest ; it was given for money loaned from time to time to the testator, when he was in pecuniary embarrassment ; that the executors had rendered a former account, and also the account in this proceeding,

GILLESPIE v. BROOKS.

but had not included this note in either of the accounts, and that the claim was made during the progress of this accounting, because of the litigation of their accounts; that when the note in question was given, the testator said, "that he hoped to be able to pay this note;" that it had never been presented to him, or demanded, nor had it been presented to the estate as a claim against it, and that no interest had been demanded, or paid. The payee, Elisha Brooks, testified that he did not intend to enforce it, until this contest arose, because his sister Mrs. Mount had requested him not to do so.

Some testimony was given upon the subject of the character of the seal, tending to show that it was an ordinary paper sold by stationers, for seals, with mucilage on one side, to adhere by wetting, and was stamped on by a letter stamp, without any water or wax being used.

The above is substantially the testimony presented upon the questions raised by the objections to the account, and urged on the argument of the case, except that some testimony was given tending to show neglect in filing an inventory, in keeping a separate account of the affairs of the estate, and a commingling of its funds, with the funds of the executors, Messrs. Brooks.

J. W. C. LEVERIDGE, and S. P. NASH, *for the executor.*

L. L. DELAFIELD, and JAMES MATTHEWS, *in opposition.*

THE SURROGATE.—As to the question of the alleged violation of the duty of the trustees in retaining the securities, such as bank and insurance stocks, it is well settled by numerous authorities that the trustees under such circumstances, must invest the fund in government, or real estate securities (*King v. Talbot*, 40 N. Y., 76). Justice WOODRUFF, in that case says, "my own judgment after an examination of the subject, bearing

GILLESPIE v. BROOKS.

in mind the nature of the office, its importance, and the consideration which alone induces a man of suitable experience, capacity, and responsibility, to accept its usually thankless burden, is that the just and true rule is, that a trustee is bound to employ such diligence and such prudence, in the care and management, as in general, prudent men of discretion and intelligence, in such matters, would employ in their own like affairs." But he further suggests that such prudence excludes all speculation, all uncertain and doubtful risks; that the preservation of the fund, and the procurement of the best income therefrom, are the primary objects of the trust, and should be primarily urged.

It is quite evident that the purpose of the testator was to provide investments which would yield a regular income for the support of his children, and the maintenance of his widow; that the trustees were chargeable with the duty of making such investments within a reasonable time after they had assumed the trust; nevertheless, it seems to be conceded by the counsel for the legatees that a reasonable time for the disposition of the irregular securities found on hand, would be 18 months, as the time afforded by the statute, for the full performance of their duties as executors.

In *Lockhart v. The Public Administrator* (4 Bradf., 21), it is held substantially that an administrator is not bound to make a temporary investment for the benefit of the estate, but that he may be required by the Surrogate to deposit the funds with a Trust Company, so as to be earning interest, while the estate is in process of settlement, and which I think substantially gives the executors that 18 months, in which to convert the securities on hand, and to make the necessary investment as trustees.

In the case of *King v. Talbot* (*supra*), there were ir-

GILLESPIE v. BROOKS.

regular investments made by the trustees themselves, which were adjudged improper, and the trustees were charged with the amount of money so involved, with 6 per cent. interest.

The counsel for the legatees claims that the bank stock, which proved to be quite profitable, should have been retained by the trustees, and that it was competent for the *cestuis que trustent* to elect to accept such securities as they chose, and reject the others, they having withdrawn all objection to the executors' account, so far as it related to the retention of the bank stock, which withdrawal bears date February 7th, 1876.

I entertain no doubt that it was the duty of the trustees to sell the securities mentioned, including the bank stock, without any objection having been made by the beneficiaries. I do not think that the objection filed to the account upon that subject, affected the rights of the *cestuis que trustent*. In other words, it seems to me that the sale of the bank stock was authorized by the trustees, and that the *cestui que trustent* were entitled to the benefit of whatever income had been derived from the bank stock up to the time of its sale, and that they had the right to discriminate in their acceptance or rejection of the income from the several accounts of stock retained, and though the language of Mr. Justice Woodruff, in *King v. Talbot*, above cited, page 91, was *obiter*, nevertheless it was based upon authority, and obvious principles of equity.

It would be very inequitable to allow trustees to make various investments in violation of the well-settled rule of law. Because one investment should prove successful, and largely renumerative, they might use that for the purpose of relieving themselves from loss, by reason of other unauthorized investments which should prove a loss; in short, each investment should stand upon

GILLESPIE v. BROOKS.

its own merits. (See *Hill on Trustees*, 374.) It becomes necessary in settling the trustees' account, in respect to a mass of securities inventoried, consisting of bank stock, insurance stock, &c., to ascertain the actual income of each particular stock; if the bank stock paid a larger dividend than 7 per cent., the *cestuis que trustent* are entitled to be credited the full amount received; and as to the insurance and other stocks, where there was a loss, the income received from them should be charged against the 6 per cent interest upon the estimated value 18 months after the issuing of letters testamentary. And one of the statements or testimony seems to afford the necessary evidence to enable me to make a statement of such receipts, or income. Hence, it seems to me that it will be necessary to make a reference to take testimony upon that subject, but it may be well to suggest that the respective legatees, except the widow, can only be charged with the excess of interest paid to them, and that any excess paid to the widow cannot be allowed to the trustees, on this accounting, as against the other legatees, for any over payment made to the widow, which must be charged to her, and the trustees must look to her estate for the purpose of reimbursing themselves (*Raly v. Ridelagh*, 7 *De Gex, M. & G.* 104; *Trafford v. Boehm*, 3 *Atk.*, 440.)

This seems to me to be the necessary result of the authorities cited, without regard to the question of good or bad faith on the part of the trustees, but it is due to the case to say that I find no evidence which impugns that good faith.

It is urged by the counsel for the trustees that the attempted election on the part of the legatees to receive the income of the bank stock, is not allowable under the authority of *King v. Talbot*, because the trust is still in force, and there is no party competent to make an election to retain the profitable investment.

GILLESPIE v. BROOKS.

I see no good reason why the continuance of the trust should debar them from such an election. If they have the right to this accounting, it necessarily involves the right to have the trust accounts finally and authoritatively settled to the date of the present accounting; and I am not able to appreciate or perceive any difficulty on the part of the adult *cestui que trustent* in making such election.

The argument would undoubtedly be good, were the *cestui que trustent* infants, or otherwise incapacitated from approving of the investments, or estopping themselves from objecting thereto.

As to the objection that certain discounts on notes were allowed without the authority of the Surrogate to compromise them, it is sufficient to answer that the executors had full power to do so, without any liability over to the estate, unless it were shown that they made a serious error in judgment: the statute authorizing the compromises of debts due to the estate by the executor and administrator does not confer upon those officers powers which they did not possess before, but affords additional protection when acting in good faith in the exercise of their common law powers. (*Redfield Surr. Pr.*, 232; *Choteau v. Suydam*, 21 N. Y., 179; *Matter of Scott*, 1 Redf., 234); and there is no evidence in this case, that the compromises made were not judicious, or that a larger sum might have been realized by the executors.

The error in the statement of the value of the 328 shares of the Tradesman's National Bank, being an understatement of \$25.62, and of 280 shares of the American Exchange Bank stock being an under-estimate of \$174,—as also the \$64.00 over statement of Home Fire Insurance stock, should be corrected according to the fact.

GILLESPIE v. BROOKS.

The objection that the executors failed to collect the debts, or to bring suits for the same, seems to me untenable, for the reason that the debts in question were such as were inventoried as worthless, and there is no evidence tending to show that any such debts were collectable, and under the circumstances appearing in the testimony, it seems to me that it would have been an unauthorized expense to the estate, to have prosecuted such claims, as were inventoried under the advice of the bookkeeper of the testator, as worthless.

The objection to the large payment by the executors, of the debts of the firm, is equally untenable, because they derived their information as to the validity of such claims against the estate from the books of the testator, and it seems to me that it would be an extraordinary precaution to require additional vouchers for such claims.

As to the payment to the then late servants of the deceased, it was sufficient authority for them to pay those claims when made, and the widow, who must have been conversant with the facts, informed the trustees that the claims were just and valid, and it should therefore be allowed as charged.

I have now reached a question involved in this case, of considerable embarrassment, which is, the objection interposed to the charges made by the executors and trustees for the payment of taxes, insurance, and repairs upon the Elizabeth property.

It is well settled that all ordinary taxes, assessments and interest on encumbrances and charges for repairs, must be paid out of the income by the life tenant (*Hepburn v. Hepburn*, 2 *Bradf.*, 74; *Griswold v. Griswold*, 4 *Id.*, 216; *Sheldon v. Ferris*, 45 *Barb.*, 124; *Pinckney v. Pinckney*, 1 *Bradf.*, 269; *Booth v. Ammerman*, 4 *Id.*, 129); but it is also held that a municipal assessment

GILLESPIE v. BROOKS.

for the flagging of sidewalks, and other improvements, must be apportioned between the tenant for life, and the remainderman.

In *Stillwell v. Doughty* (2 *Bradf.*, 311), it was held that the tenant for life must pay the annual interest upon the assessment, but that the principal is chargeable to the remainderman, and this division of the burden, is put upon the ground, by Surrogate BRADFORD, that a life tenant has the benefit, and the use of the permanent improvement, while the improvement itself endures to the benefit of the remainderman.

In *Peck v. Sherwood* (56 *N. Y.*, 615), the same principle is declared. It is also held in that case that the expenses for insurance, and placing lightning rods on the building, should be apportioned, although the case does not disclose the proportion which the court deemed proper to charge upon the respective estates, but the decision of the case of *Stillwell v. Doughty* (*supra*) seems to be reasonable and just. I am not able to discover any evidence in the will in question indicative of an intent on the part of the testator to charge his estate with the payment of taxes and assessments, the making of the necessary repairs on the Elizabeth property. Under these authorities, it seems to me that any repairs which do not come under the head of ordinary repairs, but are necessary and permanent improvements to the estate, should be chargeable to the tenants for life, and to the remainderman, or the residuary estate, in the proportion suggested by the above authorities; in other words, that a life tenant must be held liable for the interest upon the permanent improvements, and the estate held liable for the improvements themselves, but that temporary, or ordinary repairs are chargeable against the life tenant, and that in this case they are so chargeable, except so far as they appear to have been

GILLESPIE v. BROOKS.

made on the credit and responsibility of the widow, to whose estate the trustees must look for their reimbursement, unless they shall appear to have assets in their hands belonging to her, but the testimony upon the subject of such taxes, improvements, insurance, &c., is not sufficiently specific to enable me to determine the appropriate charges to the respective interests, and the matter will have to go to a reference for further proof upon that subject, so that the separate expenditures whether for permanent or temporary repairs may be clearly stated.

As to the question of the validity of the note for \$4,982.57 executed by the testator under seal, dated December 29th, 1862, I entertain no doubt upon the testimony as to the execution of the note, nor do I think that the failure on the part of the claimant to enforce payment of the note, or the lapse of time, in any way militate against the validity of the note. Such delay may be entirely consistent with the liability of the estate to pay, and the right of the owner to enforce payment; nor does the fact that the widow persuaded the owner to delay the enforcement either of interest or principal, impair its validity. While those circumstances were competent as evidence upon the subject of its validity, yet in the absence of any proof of payment, or release of the liability, or any other circumstance affecting its validity, the note must be held valid, unless it be barred by the statute of limitations.

As the note purports on its face, and by the terms of the instrument to be under seal, there seems to be no doubt of the seal, such as it is, having been attached at the time when it was signed. It is objected by the counsel for the legatees that the instrument is not under seal, as the so-called seal is not made of wax, or wafer, or any other substance capable of being impress-

GILLESPIE v. BROOKS.

ed, but is simply a paper seal, without the accustomed wafer, or wax beneath it. *Webster* defines a seal to be wax affixed to a letter, or instrument, and impressed with a seal, also wax, wafer, or other adhesive substance which closes a letter, or other paper, that which confirms, or secures—confirmation—authentication—attestation. *Bouvier*, in his dictionary, defines a seal to be an impression upon wax or wafer, or some other tenacious substance capable of being impressed; and this is the common law definition. By section 61 (2 *Statutes at Large*, 420,) it is provided that the seal of any court, or public officer may be affixed by an impression directly on the paper, and shall be so valid as if made by a wafer, or wax; but the 62d section provides that this latter section shall not extend to private seals, which shall be made as heretofore, on wafer, wax, or some similar substance.

In *Coit v. Millikin* (1 *Denio*, 376), Chief Justice BRONSON, in discussing the sufficiency of a seal of the State of Michigan, which was impressed upon paper, not upon wax, of other adhesive substance, says, "at common law a seal is an impression upon wax, wafer, or some other tenacious substance; the impression upon paper alone is not a seal except where it has been made so by statute." To the same effect is *Warren v. Lynch* (5 *Johns.*, 238).

In *Ross v. Bedell* (5 *Duer*, 462), Judge DÜER, in discussing the question whether a notarial certificate was sufficient with the seal stamped upon the paper says: "we are clearly of opinion than an actual seal stamped upon paper of sufficient tenacity to receive and retain the impression, must be deemed a seal in the technical sense, and within the strict definition of the common law,"—citing also the case of *Curtis v. Leavitt* (17 *Barb.*, 318), as authority for that principle; but though this

GILLESPIE v. BROOKS.

decision by Judge DUER, was in March, 1856, he makes no reference to the statute above referred to, passed in 1848, authorizing such an impression as a seal. In the case of *Curtis v. Leavitt*, (*supra*) Mr. Justice ROOSEVELT, held that bonds issued by a Trust and Banking Company were sufficiently sealed by the impression of a seal upon paper not impressed upon wax, or wafer, but stamped into the paper. He says, "the whole discussion on this point every sensible man must admit, were it not for some unfortunate *dicta* in the books, would look very much like childish trifling;" yet that judge fails to consider the force of the *Revised Statutes* above cited.

It is in evidence in this case that the testator intended to seal the instrument in question, and that what purported to be such, was so recognized by the parties, when he executed the note in question, and I am of the opinion under the authorities, that the paper called the seal, which was affixed by moistening the mucilage upon it, in order to make it adhere and the stamping of it for that purpose, constituted to all intents and purposes, a seal according to common law, for the mucilage was a substance sufficiently tenacious to adhere, and receive an impression, and it appears to have had that impression.

The object of a seal is doubtless to receive a permanent impression, and that at the time of the early authorities defining a common law seal, the subsistence of mucilage was unknown, but it seems to me that that substance answers the purpose of a permanent impression, much more than does an impression upon wax; the one adheres by means of moisture, the other of heating, but the wafer adheres by moisture also; besides, it seems to me that it would be an extraordinary principle to hold as between individuals making and enforcing

GILLESPIE v. BROOKS.

contracts, recognized and understood by both parties to be under seal affixed for the purpose of affecting the result, that the seal should be denied that effect; certainly, no question of public policy would forbid, and I have no hesitation in holding that the note in question is a sealed note for all practical purposes, and therefore not barred by the statute of limitations, and must be allowed to the executor holding the same.

The evidence that the owner of this note never intended to enforce it, and was induced to present it, because of what he supposed to be an improper, and unjust litigation of the claims of the trustees, constitutes no legal objection to its enforcement, and in no way militates against the validity of the claim, and even a verbal agreement not to enforce it, without consideration, would be void. I think the claimant entitled under all the facts disclosed to the amount of the note according to its terms.

As to the claim of the counsel for the legatees that no commissions should be allowed the executors in this matter, an examination of the testimony has satisfied me that the executors have not wilfully committed any breach of trust, nor have they been guilty of any vexatious conduct in their treatment of the estate. It is true that they have retained irregular securities contrary to the requirements of the law, yet they were securities paying a large income, until the entirely unforeseen and most extraordinary disaster, to wit: the Chicago fire, occurred, which swept away much of the capital of those insurance companies, and nevertheless they continued to pay the legatees as though the income had continued. I am not able to find any evidence of such dereliction of duty as would justify a refusal of commissions.

As to the question of the costs of this proceeding,

NEUGENT v. NEUGENT.

though some irregularities have been shown in respect to the trustees' account, rendering this investigation more difficult and embarrassing and expensive, yet according to my views herein expressed, several matters of considerable moment have been objected to and litigated; which have resulted adverse to the objectors. I am not prepared to say that an undue proportion of the litigation has resulted from the neglect or misconduct of the executors, and I see no good reason why the estate should not pay the expenses of the same. As to the amount to be allowed the respective counsel, let that question be reserved until the final decree.

Decree accordingly.

NEW YORK COUNTY—HON. D. C. CALVIN, SURROGATE—DECEMBER;
1876.

NEUGENT v. NEUGENT.

*In the matter of the probate of the last Will, &c., of
BRIDGET NEUGENT, deceased.*

Valid publication of a will is not made out by evidence that, immediately before execution, it was read to and approved by the testatrix, in the presence of one only of the two subscribing witnesses.

Where there was no sufficient attestation clause to aid the evidence of execution, it appeared by testimony of the witnesses, that there was no express declaration by the testatrix that the instrument was her will, nor did the witness who attended to its execution make any such declaration to the other subscribing witness; and it appeared that one of them heard the will read to and approved by the testatrix, but the other did not. *Held*, that there was no valid publication.

Although it is not essential that attesting witnesses should subscribe in the presence of each other nor in the presence of the testator, provided they do so at the time of execution or acknowledgment, yet it is essential that their subscribing be with the knowledge or at the request of the testator.

NEUGENT v. NEUGENT.

THIS was a proceeding for the probate of the will of Bridget Neugent, deceased.

George Welsh one of the subscribing witnesses to the paper propounded for probate, and who drew the will, at the testatrix' request, on cross-examination, testified that she told him to sign it for her; that he asked her if she was prepared to hear her will read, that he read it to her carefully; she said it was exactly what she wanted; he asked her if she wanted to sign the will; she took a pen, and handed it to him to let him sign for her; he asked her, "Do you want me to sign for you? Do you want me to write your name for you?" "Yes, write my name for me." She did not say anything about his being a witness to it. He signed his name there voluntarily. Some person in the presence of the sick woman requested that he should be one of the witnesses; he did not remember who.

Michael Cosgrove, a subscribing witness, testified that there was nothing said to him about subscribing as a witness; the lawyer asked him to sign, the testatrix did not. He says, "I did not hear her say anything at the time the will was signed. When I signed, Mrs. Neugent made no remark."

James A. Duggan, the physician, testified as to the soundness of the mind of the testatrix, about the time of the execution of the will.

Mary Goodwin testified that she was present at the execution of the will; that she heard the testatrix say to Mr. Welsh, "sign it;" that Mr. Welsh read the will, and asked testatrix if she was ready; she said, "Yes, sign it." She told him to sign it for her and she made her mark; she testified that the testatrix asked him to sign as a witness, but on further cross-examination, it appeared that she meant by that, that she asked him to sign testatrix' name, which he did; that witness could not

NEUGENT v. NEUGENT.

tell what he wrote, or on what part of the will he wrote it.

David Hayward testified that he saw Mr. Welsh sign the will; that witness Cosgrove signed in an adjoining room not in sight, but in the hearing of the testatrix; that he did not hear Mrs. Neugent say anything to Mr. Welsh or Mr. Cosgrove, asking them to sign the will; that she did not state what the instrument was, and that the witness Cosgrove was in an adjoining room, not in the bedroom where the will was executed.

Martin McGarr testified that he was present at the execution of Mrs. Neugent's will. He heard the testatrix say nothing with regard to the signing of the will. The witness George Welsh, was recalled on behalf of the proponent and testified that after he had read the will he asked Mrs. Neugent who her subscribing witnesses were, or if she had them; that he said to Mrs. Neugent he could be a witness; that he did not remember the reply she made; that he did not remember whether she assented; she said nothing against it.

William Burns testified that he was present when the will was read and the testatrix said it was all right, and asked him to write her name, and that Mrs. Neugent said to Mr. Welsh, "you sign it as a witness."

The witness Welsh, who drew the will and appeared to supervise the execution, testified on his recall that he signed the will voluntarily, at the request of some person in the presence of the sick woman, but that he did not remember who made the request; that the other subscribing witness Cosgrove was there to witness the paper; that he did not know that he was requested by any one to sign, but he thinks that Cosgrove was in the bed room where the testatrix lay. The witness testified: "The thing was so insignificant that I paid little atten-

NEUGENT v. NEUGENT.

tion to it; the probability is though that I done the work right, I don't remember the reply she made, but I asked her, if she had witnesses, and then Burn's name was mentioned, and I said no." He testified also that he could not tell who mentioned Burn's name, but he thought it was the testatrix; that he told the testatrix he could be a witness, and could not remember what she said, but she did not object to it; that he did not know whether she nodded, or spoke; this is the substance of the testimony.

PHILIP MALONE, *for proponent.*

JOHN M. MACKAY, *for contestant.*

THE SURROGATE.—In the absence of an attesting clause, where the person who drew the will is so uncertain as to what was done, it would be very unsafe to adjudge the will in question properly executed. If other formalities had been observed, I should feel somewhat reluctant to hold that there was evidence of a publication of the will, in the absence of an attesting clause, yet as it was read to the testatrix, it is quite probable that she understood the nature of the instrument that she procured the witness, Welsh, to subscribe for her.

In *Campbell v. Logan* (2 *Bradf.*, 98), it was held that where the testator desired a former will to be altered, and a new will was drawn, and it was read to the testatrix, and signed by her, she stating the writing was sufficient, and asked the witnesses to sign, though they could not remember that she declared it to be her last will, but only said it was all right, the evidence established a substantial declaration by the deceased, of the testamentary character of the instrument at the time of its execution.

In *Moore v. Moore* (2 *Bradf.*, 265), Surrogate BRADFORD says, that no particular form is requisite; all that

NEUGENT v. NEUGENT.

the law requires is that the testator shall communicate to the witness that it is his will, and desires them to attest. This can be done by reading, and other acts performed by third persons, provided an intelligent assent on the part of the testator is shown.

In *Carle v. Underhill* (3 *Bradf.*, 105), the following language is used; "When the testator in the presence of the subscribing witnesses dictates the provisions of the instrument, reads it aloud after it is shown, signs it, and requests them to give their attestation, the substance of what the statute requires is performed; that then he manifests it, and makes public and open, the nature of the act."

In *Bagley v. Blackman*, (2 *Lans.*, 41), it appeared that the instrument propounded was executed by the testator, and the witnesses were requested to sign the same, and it appeared that they had been called for the purpose of signing the will, but it no where appeared that the testator declared what the instrument was, and the witnesses had no knowledge that the instrument was a will, except from that fact. The court reversed the order of the Surrogate admitting the will to probate.

In *Brinkerhoff v. Remsen* (8 *Paige*, 488), it was held that where the instrument propounded was in the hand writing of a third person, and executed by the deceased by signing it, and acknowledging it to be her hand, and seal, in the presence of the subscribing witnesses, and the instrument was not read, nor was anything said at the time from which the witnesses understood it to be a will,—the instrument was not duly executed, though the attestation clause which was not read in the hearing of the witnesses stated the will to have been duly published in the presence of such witnesses.

At page 498, the Chancellor says: "I think there can

NEUGENT v. NEUGENT.

be no reasonable doubt, that if this will, and attestation clause, or even the attestation clause alone, had been read over in the presence and hearing of the testatrix or that the witnesses could be fully satisfied that she knew and understood its meaning, that request to them to attest it as witnesses, would have been such a recognition of the instrument as her will, as to make it an execution thereof, according to the spirit and intent of the statute."

In the *Matter of Forman* (1 *Tucker*, 205), one attesting witness testified that the testator told her in the room where the will was executed, before signature, that it was her will; and the other witness testified that while she did not, in the room where the will was executed, tell her that it was her will, yet when she came to the kitchen to call her as a witness, she told her that she wanted her to witness her will—held that this was sufficient, together with the proof that she signed the instrument in the presence of two witnesses, and they signed their names in her presence, and in the presence of each other.

In *Gilbert v. Knox* (52 *N. Y.*, 125), it appeared by the testimony of one of the subscribing witnesses, that he was present at the execution; it was subscribed by the testator in the presence of the witnesses; one of the witnesses stated to the testator that it was necessary that he should request the witnesses to sign his will, as such, and say that it was his (testator's) will, and that he wished the witness to sign as such. This occurred after the will was signed, and before the witnesses signed, and in the presence of the testator, and each of the witnesses; the testator made no reply. Witness testified that he had no doubt but that the testator heard him, and that the testator took the will, and retained it.

The Surrogate refused the probate as for want of a

NEUGENT v. NEUGENT.

valid publication, but the Court of Appeals reversed it, holding that there was a valid publication, as the witness had charge of the execution, and assumed to speak for the testator, and that his agency was consistent with his relation to the testator, and the will. Judge ANDREWS says, at page 130, "the circumstances show that the testator intended to make a valid execution of the will, and the witnesses signed it at his request within the case of *Peck v. Cary*. If he is held to have adopted the declaration of Cohn (the witness) in respect to the attestation by the witnesses, the presumption is equally strong that he adopted that part of it in which Cohn declared that it was the will of the testator."

The cases above cited present the extreme limit of a valid publication, and it seems to me that this case does not come up to the standard laid down by either of the cases cited. In this case there appears to have been no declaration by the testatrix that the instrument was her will, nor did Welsh, who attended to its execution, make any such declaration to the witness Cosgrove, nor does it appear that Cosgrove heard the will read, and all he knew about the instrument being a will was, that Mr. Welsh asked him to sign as a witness; and from the evidence, I am satisfied that there was not such a publication as is required by the statute. Indeed, the testimony of the witness Cosgrove does not show that he was present when the testatrix signed the will, or that he heard her make any remark in respect to it, neither did she state what the instrument was, nor ask the witnesses to subscribe the same as such.

The weight of the testimony upon the subject of the request of the testatrix to the witness Cosgrove, to sign as such, seems to be, that nothing was said by the testatrix, but he was requested to sign by the other witness Welsh.

NEUGENT v. NEUGENT.

It does not appear that that request was in the presence, or hearing of the testatrix, and it does quite clearly appear that the subscribing by Cosgrove was in an adjoining room, and I think there is an absence of proof that the testatrix knew that Cosgrove subscribed the instrument. I am aware that it is not essential that the attesting witnesses should each subscribe in the presence of the other (*Hoysradt v. Kingman*, 22 N. Y., 372; *Willis v. Mott*, 36 Id., 486), nor is it necessary that the witnesses should sign in the presence of the testator. (*Rudden v. McDonald*, 1 Bradf., 352; *Jackson v. Christman*, 4 Wend., 277). If they sign at the testator's request, although in an adjoining room, out of sight, it is sufficient, though their signing must be done at the time of the execution, or acknowledgment with the knowledge and at the request of the testator (*Lyon v. Smith*, 11 Barb., 124), but I think the proof in this case fails to show that the signing of the witness Cosgrove was with the knowledge, or at the request, of the testatrix.

In *Lewis v. Lewis* (11 N. Y., 220), Mr. Justice ALLEN says, "the legislature have made four things essential to the proper execution and attestation of a will. The want of conformity to any of these requisites, will validate the instrument as a testament. They are:

1st. A subscription by the testator at the end of the will.

2d. The making of such subscription in the presence of each of the attesting witnesses, or an acknowledgment of the making of the same to them.

3d. A declaration by the testator at the time of making or acknowledging the subscription, that the instrument so subscribed, is his last will and testament.

4th. The two attesting witnesses shall sign at the end of the will at the request of the testator."

NEUGENT v. NEUGENT.

In that case, one of the witnesses testified that he signed his name at the end of the attestation clause, at the request of the testator, and that the other witness was called by the deceased into his private office, where he had the paper of which he turned up so much as would allow them to write their names, requesting them to sign the same, and add their residence, and that he said "I declare the within to be my free will and deed;" that this was all that was said; that the witness did not know it to be a will, but thought it was, from the fact that the deceased that morning sent out, and procured a blank will; that he did not see the paper signed by the testator, or see his signature. It was held that the will was not duly proved.

On a careful review of all these authorities, and the testimony in this case, I am of the opinion that the will in question has not been duly proved, and that the probate should be denied, for the reason that the testatrix did not publish the instrument according to law, and that the subscribing witness Cosgrove did not subscribe at the request of the testatrix, or in her presence.

Decree accordingly.

WADE v. HOLBROOK.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—DECEMBER, 1876.

WADE v. HOLBROOK,

In the matter of the Probate of the last Will and Testament of CHARLES CRAFT HOLBROOK, deceased.

The rule is well established that the testator must at the time of executing his will, have had sufficient capacity to comprehend the condition of his property, and his relation toward the persons who are, or might be, the objects of his bounties, and the scope and bearing of the provisions of his will.

Mere imbecility or weakness of mind, however, does not incapacitate, if there be sufficient understanding to satisfy the foregoing rule.

Undue influence to avoid a will, must be such as to deprive the testator at the time, of the free exercise of his will; and must be exercised in respect to the very act. And the fact must be proved; it will not be inferred from opportunity and interest.*

Where a testator caused to be prepared a codicil modifying his will in respect to certain trusts therein created, and republishing it as modified, and at the same time caused to be prepared a trust deed, involving the same property and beneficiaries, and there was some evidence that he intended to execute them simultaneously, but because of the absence of a party, failed to execute the deed until sometime after he had executed the codicil;—*Held*, that they were to be considered together, and construed as intended to be harmonious.†

If there be, in such a case, substantial conformity in the provisions of the deed and the testamentary act, the deed is not to be regarded as a revocation of the will.

The testamentary act passes after-acquired property, while the deed does not; and therefore the former should not be deemed necessarily revoked by the latter.

The fact that the deed expressly includes after-acquired property which may come to the hands of a particular agent, does not affect the question of constructive revocation.

The objection that a trust in the will may violate the statute restricting the suspension of the power of alienation, is not ground for refusing probate of the will.

If an ulterior trust is void on this account, it may be dropped, allowing the primary provisions to stand.‡

*Compare *Fagan v. Dugan*, *ante*, p. 341

†Compare *Mott v. Rickmyer*, 57 N. Y., 49.

‡Compare *Ross v. Ross*, 4 Abb. Ct. App. Dec., 108.

WADE v. HOLBROOK.

THIS was a proceeding for the probate of the last will and testament of Charles Craft Holbrook, deceased.

The will in question bore date 19th November, 1874, and was then witnessed by William Coit and E. L. Sanderson.

On the 18th day of March, 1875, the will was executed, and witnessed by Messrs. Coit, Sanderson, and Evelina T. Lawrence. On the 19th day of March, 1875, the testator executed a codicil to the will witnessed by the last named witnesses, Coit, Sanderson and Lawrence.

By his will, in addition to certain small bequests, the testator gave to his wife, Amelia A. W. Holbrook, \$20,000 in lieu of dower, and to his son, Charles Albert, \$1,000, and released him from any accounts or claims against him for advances, or debts, or otherwise; and the rest and residue of his estate, real and personal, he devised and bequeathed to trustees, upon the following trusts;—to invest \$8,000, and to pay the income semi-annually to Miss Ellen Parker Bigelow, during her life, and on her decease, the same was to fall into his residuary estate, and be added to the fund created for his son, Charles Albert; also to invest the sum of \$2,000, and pay the income to Mrs. Elizabeth Rolfe, during her life, the principal at her death to fall into the residuary estate, to be added to the fund created for his son, Charles Albert,—and the remainder to be invested, as another separate trust for the benefit of his son's children, the income to be applied semi-annually to him, during his life, in addition to the sums above invested, for the interest of Miss Bigelow, and Craft Rolfe, and at the death of said Charles, to be equally divided among the children of his said son, and if he should die without issue, the same should be paid to Alice and Addie Wade, in equal shares, at their arrival at 21 years respectively.

WADE v. HOLBROOK.

It was further directed, that in case either of the trusts to Miss Bigelow, and Miss Rolfe, should fail, by their decease before the testator, the sum thus directed and appropriated should belong to his residuary estate, and if the persons, and their issue above named should die before the testator, then his estate, or the residue should be equally divided among his heirs at law.

The testator appointed the trustees named, his executors. By his codicil, he ratified, reaffirmed, and published his former will in all particulars, excepting as to an alteration made by the codicil. The codicil gave to his wife the testator's household furniture, plate, pictures, books, jewelry, clocks, watches and wardrobe. It revoked the third clause of the will, whereby he had given \$1,000 to his son Charles, and directed that if said son Charles should at his decease be indebted to his estate, such debt and securities therefor should be taken as, and form part of, the trust fund created for his benefit, and gave power to his trustees; to enforce the payment of such debts, and apply the securities as his trustees should deem expedient, but the trustees were not to be held obliged to collect such debts, or to realize any part, unless the trustees should deem it for the interest of his said son's wife and children, and the codicil also provided that in case proceedings should be taken by any creditors of his son to reach the income of the trust fund in behalf of his son, in that case his son's interest in the income should cease, and the income should forthwith during his life, be paid by the trustees to his wife, and in case the wife should die before Charles, the principal of the fund and accumulated interest should be paid over to the persons who, according to the will, were to receive it upon the death of Charles; and if it should happen that Charles' present wife should not be living at the time of such proceeding by creditors, then the principal and accumulated

WADE v. HOLBROOK.

interest should be paid over to such persons as would be entitled in case of his death, according to the will. The testator also authorized the trustee to use so much of the income during the life of Charles as she should deem expedient towards paying premiums to any person for insurance which might have been or might hereafter be effected on Charles' life, payable to his wife in case of his death, and appointed the testator's wife, trustee, under the will, of the several funds, and also executrix of the will in lieu of the executors and trustees named by the will.

The testator executed a deed of trust, so called, bearing date the 26th day of March, 1875, to William Cushing, by which, in consideration of \$1, and divers other good and sufficient considerations, &c., he sold, assigned, transferred, and conveyed unto said Cushing, the promissory notes, bonds, choses in action, and personal property then in the hands and possession of said Cushing, held by him as the agent of the testator, a schedule of which was to be annexed to the instrument, as soon as could conveniently be done, and also all his right, title, interest and claim to all other personal property which then was, or might thereafter be held and possessed for the testator, by any other person, or persons, in or to which he had any right, title, or interest to have and to hold to the trusts declared as follows :

First.—To collect, manage, and invest such property as he, in the exercise of his best judgment, should deem fit, and pay the income and profits to said testator during his life, and on his decease, to pay from the principal \$20,000 to his wife, and \$100 to his daughter, Mrs. Wade, and the like sum to each of her sisters, Ella G. and Georgiana May, and to convey, transfer, and set over, unto his said wife, all the rest and remainder of his property, then in said Cushing's hands ; to invest \$8,000 for the benefit of Miss Bigelow, and pay to her the

WADE v. HOLBROOK.

income during her life, and at her death to add that amount to that created for the benefit of his son Charles Albert, and family; to invest \$2,000 for the benefit of Miss Rolfe, and pay her the income during her life, and at her decease to add the principal to the sum provided for his son and family; to pay out of the remainder \$500 to Miss O. A. Plummer, the like sum to her daughter, Annie M. Plummer, and from the remainder, to create a fund for his son, Charles Albert, to which should be added the principal of the two funds above mentioned, when the principal should fall in, by death of the beneficiaries, and manage the same according to her best judgment; to pay the income and profits to his said son, Charles A. Holbrook, as she might deem fit, and for the best interests of said Charles A. during his life, and upon his decease, to divide the principal into as many shares as he should leave children, surviving him, and pay one share to each, the children of any deceased child to take the parent's share, and in case no child should survive, in such case the fund was to be equally divided between the children then living of Mrs. Wade; but in case the interest should be attached, or proceedings taken against said Charles Albert, by any creditors, then his interest should cease, and the income should during his life be paid by said trustee to his wife, and if she should not be living, then to pay the principal and accumulation of interest to his children in equal proportions, the issue of any deceased child to take the parent's share, and, if his wife should see fit, to expend any sum towards the payment of any premium upon policies of insurance effected upon the life of said Charles.

It was covenanted in this conveyance that said Cushing should not be liable for any loss in regard to the property thus conveyed, unless sustained by his wilful default or neglect, and he covenanted that in

WADE v. HOLBROOK.

case the testator's wife should not survive her husband, or should decline to hold said residue which should remain after she had received her \$20,000, or sign proper covenant binding herself to fulfil the same, in that case, he would hold the said remainder upon the same trusts, and execute the same, but to be only responsible for the exercise of good faith and judgment.

It appeared by the testimony of Mr. Coit, who drew the codicil, that this trust deed which had been drawn in Boston, was submitted to him for consideration and some amendment, about the time that the testator applied to him for the drawing of the codicil, which it would seem was intended to have been executed at the same time, but that the delay in the execution of the trust deed arose from the failure of Mr. Cushing to attend at Brooklyn where the instruments were executed, at the time a meeting for the purpose had been fixed.

Mrs. Fanny Clark Wade, daughter of the deceased by his first wife, filed allegations against the probate of the will; that it was not executed, or attested according to law; that the testator was not competent to make a will at the time; that its execution was procured by fraud, imposition, and undue influence practiced by the legatees, or by some person at their instance, unknown to the contestant, and he was under the influence, duress, and restraint of the legatees, and devisees; that said instrument and codicil were void, as suspending the power of alienation for more than two lives in being, and were void for that reason; that on the 26th day of March, 1875, the deceased executed an instrument whereby he sold, assigned, and transferred unto Mr. Cushing, certain estate and property therein named, being the same estate, and property purporting to have been devised or bequeathed in said will and codicil, by which instrument deceased purports to have been wholly divested of said estate and property; that said

WADE v. HOLBROOK.

instrument purports to operate as a revocation of such devises and bequests, and that said instruments were not the last will and testament of the deceased.

A large amount of testimony was taken in the case, principally upon the subject of the condition of the estate prior to and about the time when the testator executed the will in question and the codicil, and some testimony which, it was claimed by contestant's counsel, showed undue influence exercised over the testator by his wife and by his son, in hostility to the contestant.

The testator was formerly a resident of Boston, and by his first wife he had several children, to wit: Charles Albert Holbrook, Fanny Clark Wade, Alla Gertrude O'Neill, and Georgiana May Growted; and some 12 years or more ago, the testator procured a divorce from his first wife, with whom his daughter, Mrs. Wade, before her marriage, in April, 1864, resided, and she removed with her mother to the city of Brooklyn, New York, where she resided under an assumed name. The testator remained without any intercourse with his daughter, Mrs. Wade, until after she married in April, 1864, and until after the birth of her first child. He came on soon after to their house, and thereafter, from April, 1865, he visited his daughter whenever he came to New York, which was several times in the year. On testator's return from Europe, in 1873, he was very ill at the hospital in Boston, and Mrs. Wade went on, at the suggestion of her aunt, Mrs. Cushing, to see her father, and remained in attendance upon him for several weeks. Between 1864 and 1873, the testator and his daughter Fanny were in the habit of regular correspondence. During his illness at Boston, he was considerably deranged in his mind, suffered intensely from cancerous difficulty in the lower part of abdomen, and took very powerful medicines and opiates. At times he would jump out of bed, threaten to kill himself, and

WADE v. HOLBROOK.

jump out of the window. He told the attendants to hide his razors so that he might not commit suicide, and exhibited great fickleness in respect to his opinion, likes and dislikes of his nurses and physicians.

He however recovered from his illness, discharged his physician, and became thoroughly impressed with the idea that he would become perfectly cured, and appeared to be in improving health, and his mind appeared to be restored to its normal condition, and such seemed to be the effect of the testimony as to his condition, when the will was executed in November, 1874.

Some testimony was given in respect to strange conduct of the testator several years ago, when he was laboring under some trouble about his divorce, but he seemed afterward to have recovered from that.

Prior to the execution of the will, and in June, 1874, on learning that her father was visiting in Brooklyn, at the house of Mrs. Hopkins, who was the mother of his second wife, Mrs. Wade wrote a letter to her brother Charles A. Holbrook, stating that she had learned that her father was visiting Miss Hopkins, and contemplated marrying her, and requested him to use his influence with his physician in Boston, to persuade them that marriage would be detrimental to his health, and asked him (her brother) to keep the matter secret, but use his influence through the physician to dissuade her father from marriage.

The father ascertained the existence of this communication, and it displeased him, and subsequently a copy was furnished to Mrs. Holbrook, his second wife, which created a feeling of alienation between them. Subsequently a will was made by the testator by which he withheld his bounties to Mrs. Wade. When his will was being prepared, testator stated to Mr. Coit, who drew it, that he did not consider Mrs. Wade was very friendly to him, and the witness testified that there

WADE v. HOLBROOK.

seemed to be some difficulty between them—that testator told him also, that he had several articles of furniture, books, &c., in Mrs. Wade's possession, for safe keeping—that he had called upon her for them, and she declined to give them up, and that the testator seemed to feel greatly hurt by it, and expressed some indignation, and that Mr. Wade was unwilling to give the articles up unless they (himself and wife) were satisfied that other provisions were to be made in behalf of Mrs. Wade; that witness was under the impression that the demand and refusal had occurred in September, 1874, and that the testator brought witness an account against Mrs. Wade, which he desired prosecuted, but which was not prosecuted, and was afterwards withdrawn.

The testator was married to his second wife, on the 1st October, 1874, and in the spring of 1875, he went South with his wife, for his health, and returned, and passed a portion of the summer in New Jersey, where Mrs. Wade visited him once, and it was claimed by contestant's counsel that she was received with great cordiality by her father, but was rather coolly treated by his wife, who seemed to avoid leaving her husband with Mrs. Wade alone.

Some testimony was also given, tending to show apparent reconciliation, or at least kindly relations between the deceased and Mrs. Wade, while he was sick during the summer of 1875, in New Jersey, and after his return to the city of New York, and while he was in his last illness, but there was no testimony tending to show any undue influence exercised upon the testator, either by his wife, or his son Charles, in respect to the provisions of the will or the exclusion of Mrs. Wade; and the only testimony that tended in that direction was, that his son disclosed the terms and character of Mrs. Wade's letter in respect to his proposed marriage with his second wife, and the alleged fact that Mrs.

WADE v. HOLBROOK.

Wade's visits to her father seemed not to be agreeable to his wife, after Mrs. Holbrook had ascertained the character of her letter, and her effort to prevent her father's marriage with her.

J. D. TAYLOR, *for proponents.*

ABBOTT BROTHERS, *for contestants.*

THE SURROGATE.—On the question of capacity of the testator, at the time he executed his will, and particularly at the time he executed his codicil, it is impossible to escape the conclusion that he was perfectly sane, and capable in all respects of making his will.

The rule is well established in such cases, that the testator must, at the time of executing the will, have had sufficient capacity to comprehend the condition of his property, and his relation toward the persons who are or might be objects of his bounties, and the scope and bearing of the provisions of his will. (*DeLafield v. Parish*, 35 N. Y., 9; *Van Guysling v. Van Kuren*, 35 *Id.*, 70; *Tyler v. Gardner*, 35 *Id.*, 559; *Kinne v. Johnson*, 60 *Barb.*, 69.) Mere imbecility or weakness of mind however, does not incapacitate, if there be sufficient understanding to satisfy the foregoing rule.

I think there is no reason to doubt the mental capacity of the testator to make the will in question.

As to alleged undue influence, the rule is well stated in *Gardiner v. Gardiner* (34 N. Y., 155), that it must be made to appear that the importunity or influence was such as to deprive the testator, at the time, of the free exercise of his will, and such undue influence must be exercised in respect to the very act, and the act must be proved; it will not be inferred from opportunity and interest. (*Sequine v. Sequine*, 3 *Keyes*, 663; *Kinne v. Johnson*, 60 *Barb.*, 69; *Van Hanswyck v. Wiese*, 44 *Id.*, 494.)

In this case, there seems to be nothing that rises to the dignity of proof, showing any such influence in procuring the will in question. All there is that suggests

WADE T. HOLBROOK.

suspicion, is the fact that he neglected to make provision for his daughters of his first and divorced wife, with whom they consorted, and particularly Mrs. Wade, who it appears offended him in respect to his property in her possession, as he claimed. Notwithstanding, there seems proof of reconciliation between them, before he executed the codicil.

The only question remaining for determination in this matter is the effect upon the will and codicil of the trust deed to Mr. Cushing, executed by the testator, as of March 26th, 1875.

The testimony of Mr. Coit shows that the codicil and the trust deed were both under consideration at the same time; and sufficient evidence is given by him to show that they were probably intended to be executed at the same time. It is therefore not probable that they were intended to be substantially hostile to each other, and it is difficult to conceive that the execution of the codicil, which was a republication of the will, except as modified by it, was designed to be nullified by an instrument intended to be executed at the same time, but which, for sufficient reasons, failed to be executed, until a few days subsequent. Indeed, these facts seem to indicate strongly an intention on the part of the testator and grantor to make them substantially harmonious; and so we are left to determine that question upon the terms of the instrument, and upon the fact of their consideration at the same time, and an apparent intention that they were to be executed at the same time.

By the statute (2 *Rev. Stat.*, 65, section 47), it is provided that a conveyance, settlement deed, or other act of a testator, by which his estate, or interest in property previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property, but such

WADE v. HOLBROOK.

devise or bequest shall pass to the devisee or legatee the actual estate, or interest of the testator which would otherwise descend to his heirs, or pass to his next of kin, unless, in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest; and by section 48, it is provided, that if the provisions of the instrument by which such alteration is made are inconsistent with the terms or the nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition not be performed or such contingency did not happen.

An examination of the will and codicil, with the provisions contained in the trust deed, shows substantial conformity in their terms and provisions, and if they were intended to be executed at the same time, and drawn for that purpose, it would seem that the trust deed was not intended to be a revocation of the will and codicil.

In *Vreeland v. McClelland* (1 *Bradf.*, 417), the learned Surrogate held that a conveyance of all the property of the decedent, on the same day that he had made his will, did not revoke the will; and says, "it cannot be seriously contended that a will and a deed executed almost, if not quite, simultaneously, as to their general purport in harmony with each other, so that they may fairly be considered as a part of the same transaction, are, notwithstanding, to be construed in such a way that the deed is to nullify the will on the ground that it was an intention to revoke a solemn act just consummated a few minutes before; the reasonable conclusion would be just the other way, namely, that instead of contemplating a revocation of the will, giving the estate after his death, by a trust deed assuring the same estate to the grantee, on the same contingency, the instruments,

if valid, were both intended together to be a complete and effectual disposition of the decedent's entire property, by a double mode of assurance."

It is undoubtedly true, and well settled by authority, that where a testator has devised specific property, and afterwards sells or disposes of the same property, this amounts to a revocation of such devise or legacy. (*Redfield, Surr. Pr.*, 93; *Herrington v. Budd*, 5 *Denio*, 321.)

The language of that decision, at page 323 is, "Any alteration of the estate, by the testator, or in his interest, or any modification of it, which converts it into a different estate from the one the testator made at the time of the devise, even though the testator took back the estate in an altered condition by the same instrument, is a revocation of the will or devise." (See *McNaughton v. McNaughton*, 34 *N. Y.*, 201, *Barstow v. Goodwin* 2 *Bradf.*, 413.)

If the instrument or trust deed in question had not been contemplated at the time when the codicil was executed or intended to be a part of the transaction, under the 47th section of the statute above cited, the testator's interest in his property was not wholly divested by the trust deed, and there is nothing in the instrument declaring his intention to revoke his will or codicil, and it cannot be said, under the 48th section, that the instrument is wholly inconsistent with the terms and nature of his previous devise.

The will and codicil in question took effect at the decease of the testator, and covered in terms all the property owned at the time of his decease, while the deed takes effect from the time of its delivery, and cannot be held to cover any estate subsequently acquired.

It is true that the trust deed in question contains this clause: "Also all my right, title, interest, and claim, either at law or in equity, in or to all other pro-

WADE P. HOLBROOK.

perty which may now or hereafter be held and possessed for me by any other person or persons whatsoever." The other property conveyed by this provision of the deed is the property alleged to be in the hands and possession of Mr. Cushing, the grantee, and thereafter held by him as the agent of the grantor.

The testimony shows that a considerable quantity of furniture and household goods was, subsequent to the execution of the trust deed, purchased by the testator, which could not pass by the deed, but is covered by the will and codicil, and whatever may be the ultimate adjudication as to the effect of the trust deed upon the will and codicil, or to the property owned at the time such deed was executed and delivered, it is clear that after acquired property is disposed of by the will, the trust deed should not for that reason be held to revoke the will and codicil, and they should not be admitted to probate.

It is not necessary to determine at this stage of the proceedings the question whether the will and codicil or trust deed contained provisions in violation of the statute against the suspension of the absolute ownership, or the power of alienation of property for more than two lives in being at the death of the testator, for if such be the case it does not constitute an objection to the probate of the will.

If any ulterior trust is bad for the reasons suggested, it may be dropped, allowing the primary provisions to stand and be enforced. (*Harrison v. Harrison*, 36 *Id.*, 543; *Burrill v. Boardman*, 43 *Id.*, 254.)

Decree admitting the will and codicil to probate accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—DECEMBER, 1876.

FOSDICK v. DELAFIELD.

In the matter of the Estate of SUSAN M. PARISH, deceased.

In determining whether the will effectively appoints a person named as executor, the intention of the testator must be discovered from the words of the will, if plain and obvious, and not from extraneous circumstances; and the court must proceed upon known principles and established rules, not on loose conjectural interpretation, nor by considering what a man may be imagined to do in the testator's circumstances.

Where the words of the will are plain, the intent always follows. The will cannot be added to nor its omissions supplied.

The court cannot give effect to the will contrary to the plain and obvious import of the terms used, upon mere conjecture as to testator's intentions, nor upon suspicion that he did not understand the terms used, even though adopting the plain and obvious import will defeat the provisions.

Where the testator has used plain and proper language to express his intention, and there are no ambiguities, nor any other provisions of the will inconsistent with the language used, the court cannot look outside of the terms of the will for the expression of the testator's intention. Much less can the court assume to conjecture what he intended, independent of the language, or base a construction upon its notion of what ought to have been his intention.

The will, after naming two brothers of the testatrix as executors, added, "and in case both of my said brothers herein lastly above named shall depart this life prior to my decease, or in case they shall both decline to act as such executors, then I hereby nominate and appoint,"—here naming a son of each of the brothers. Both brothers survived the testatrix. One declined to act. The other qualified as executor, and both subsequently died.

Held, that there being nothing in the will to evince a controlling intention to keep the administration in the family, the court could not, on extrinsic evidence that both testatrix's brothers were advanced in age at the time the will was made, disregard the words "prior to my decease," and grant letters to a son of one of the brothers. Such words constitute a condition.

An executor of an executor has no interest in the estate of the testator of the first executor, nor any control over its administration.

FOSDICK v. DELAFIELD.

The fact that, on the death of the executor of a former estate, trust funds of that estate have come to the hands of his executors, does not give them an interest in the question as to who is entitled to receive new letters on the former estate, or to petition for a revocation of new letters because issued to one not entitled to receive them.

THIS was an application to revoke the letters testamentary granted to Lewis L. Delafield, on the will of Susan M. Parish.

The petition was by Charles B. Fosdick, William H. Marvin, and Annie Frances Emmett, formerly Annie Frances Monson. It alleged that about the 18th day of September, 1861, letters testamentary were issued to Henry Delafield, now deceased, who qualified and entered upon his duties as executor and continued so to act until his death, February 15th, 1875, when he was the sole executor of the estate; that he left a will which was admitted to probate March 1st, 1875, by which he appointed the petitioners and one Maturin L. Delafield executors thereof, who qualified and received letters testamentary on the same day; that at the death of Henry Delafield, a certain trust fund created by the will of the testatrix, Susan M. Parish, was left in his hands, whereby the testatrix bequeathed to her executors \$3,333, in trust to invest on bond and mortgage, &c., to pay the interest and income to Edith Delafield, wife of John Delafield, during her life, and upon her death to divide the principal among her children surviving her, share and share alike; that this trust fund had come into the hands of the last named executors of Henry Delafield. That in addition thereto there was, at his death, another trust fund in his hands, set apart by will of the testatrix, in favor of one Mrs. Monson, and that by an order of the Supreme Court the petitioners Marvin and Emmett were appointed trustees instead of Henry Delafield, deceased; and that the petitioner and said Maturin L.

FOSDICK v. DELAFIELD.

Delafield had accounted to the last mentioned trustees for the trust fund last mentioned, and paid it over to them; that after the death of Henry Delafield, and in October, 1875, Lewis L. Delafield applied *ex parte* to Surrogate HUTCHINGS for letters testamentary upon the estate of the testatrix, claiming to be named as such in her will and trustee thereunder; but petitioners alleged that he was not so named; that on the day last mentioned, the Surrogate issued letters to him, and that a written opinion of said Surrogate HUTCHINGS, given upon granting the application, stated that the question raised was not free from doubt, and that letters would be granted without prejudice in any manner or degree, by reason of their being granted *ex parte*, to a reconsideration of the whole matter, &c.; that on the 28th of October, 1875, the petitioners filed a petition addressed to Surrogate HUTCHINGS, praying a final settlement of their accounts as executors of their said testatrix, and praying also for a revocation or confirmation of the letters issued *ex parte* to Lewis L. Delafield; that Maturin L. Delafield, the brother of Lewis, named in the petition, did not sign the same, though opportunity was offered him, but declined, wherefore petitioners did not request him to join in the present application; that on the filing of such petition proceedings were had, the usual citations issued, the accounts of the present petitioners and of Maturin L. Delafield in respect of the administration of their testator, Henry Delafield, upon the estate of the testatrix, were finally settled and allowed by Mr. VAN SCHAICK, who succeeded, as Surrogate, Mr. HUTCHINGS; that the question raised by the prior petition as to the validity of Lewis L. Delafield's title was not decided on such settlement, but was argued at length on both sides before Surrogate VAN SCHAICK, and was decided by him prior to his death.

FOSDICK v. DELAFIELD.

The petitioner prayed that such letters be revoked, and that the petitioners and Maturin L. Delafield, executors of Henry Delafield, be declared entitled to hold and administer the estate of the testatrix; and that said Lewis deliver to them the assets in his hands, etc.

The provision of the will of the testatrix appointing the executors thereof, was as follows: "Lastly, I hereby nominate my brothers, Joseph Delafield and Henry Delafield, executors of this my last will and testament; and in case both of my said brothers, herein lastly above named, shall depart this life prior to my decease, or in case they shall both decline to act as such executors, then I hereby nominate and appoint Lewis Delafield, son of my said brother, Joseph Delafield, and Edward Delafield, son of my said brother, Rufus K. Delafield, to be such executors of this my last will and testament."

It appeared that the brothers of the testatrix, named as executors, were much her seniors in age; that Henry Delafield qualified as executor and continued as such until his decease; that Joseph never qualified, and he was now deceased.

The question now presented for determination was whether the contingency contemplated by the testatrix in her will has happened, by which Lewis Delafield was appointed executor.

EDGAR S. VAN WINKLE, *for the petitioner.*

LEWIS L. DELAFIELD, *in opposition.*

THE SURROGATE.—By the literal terms of the will, the appointment of Lewis Delafield would appear to be dependent upon the decease of Joseph and Henry, occurring prior to the decease of the testatrix; whereas, the fact is that both of them survived her. I have examined with considerable interest and care the opinion of the late Surrogate upon this interesting question, and I should not presume to reconsider the question, were it

FOSDICK v. DELAFIELD.

not for the suggestion, made in that opinion, that the application was *ex parte*, and, in substance, was not to be regarded as final, but subject to review, upon a proper application.* And I differ with the learned Surro-

*The proceeding before Surrogate HUTCHINGS was upon the petition of Lewis L. Delafield, Esq. The petition alleged, among other things, that the petitioner was advised that, under the circumstances set forth, the office and duties of executors in trust, by the tenor and intention of the will, devolved upon the petitioner and Edward Delafield, the other nephew named, and prayed for the construction of the will in that respect to the end that letters testamentary might be issued to them, or one of them, or that the proper letters might be issued to those entitled there:to. The following opinion was given upon the application, by Surrogate HUTCHINGS in Oct. 1875.

THE SURROGATE.—Upon the facts presented, the question arises, whether letters testamentary upon the will should issue to the two nephews of the testatrix named in the appointing clause, or to either of them; or whether it is a case for letters of administration with the will annexed.

(1) The petition impliedly raises the inquiry whether letters testamentary can issue to the two nephews "as executors according to the tenor," as that expression is understood in law. This depends upon the provisions of the whole will, other than the appointing clause, as that contains nothing pertinent to the inquiry.

An executor "according to the tenor" is defined by *Bourier* as one "not directly appointed by the will an executor, but who is charged with the duties which appertain to one; as I appoint A. B. to discharge all lawful demands against my estate." (*Law Dict.* and cases cited). And according to *Williams on executors* (p. 203,) "the appointment of an executor may either be express or *constructive*, in which case he is verbally called executor *according to the tenor*; for, although no executor be expressly nominated in the will by the word executor, yet if, by any word or circumlocution, the testator recommend or commit to one or more the charge and office or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors;" and in a note, "the use of the word executor is not essential to the appointment of a person to execute the will. An executor may be appointed expressly or constructively, and designated by committing to his charge those duties which it is the duty of an executor to perform; by conferring those rights which belong to his office; or by any other language from which the intention of the testator to invest him with that character may be inferred."

But the appointment of executors by construction or implication is not favored, and in doubtful cases, administration *cum test. an.* must be resorted to (*Harnett v. Wandell*, 2 Hun, 552).

FOSDICK v. DELAFIELD.

gate with some reluctance; and yet, upon the best consideration of the question I have been able to give, I am persuaded that he mistook the force of the doctrine that the intent of the testatrix should control

Applying what has been said to the present case, the two nephews of the testatrix are not named in any part of the will, other than the clause above, as being charged with any of the duties appertaining to an executor, or as being given or clothed with any of the rights belonging to the office of an executor, or referred to by name, in any language importing the testatrix's intention to invest them with that character; and consequently, they cannot, independently of the appointing clause, maintain their right to letters testamentary as "executors according to the tenor."

(2.) Letters testamentary can issue to them therefore, if at all, only on the ground of an express appointment, as executors, under that clause of the will above set forth.

Before discussing that question, some further citations from *Bouvier* may be of service. He refers to *substituted*, *instituted* and *conditional* executors, and defines the former to be one appointed, if another who has been appointed refuses to act; the next, to be one who is appointed by the testator without any condition, and who has the first right of acting when there are substituted executors. An executor may be appointed *conditionally*, and the condition may be precedent or subsequent. Such is the case when A is appointed in case B shall resign.

In this case, then, it would appear that the two brothers of the testatrix were, within the definition given, appointed instituted executors, and the two nephews were appointed *substituted* executors.

The former were no less *instituted* executors because the clause referred to the contingency of their death before the testatrix, for that contingency might happen in any case of any instituted appointment.

If the brothers had died before the testatrix, or, if surviving her, they had both declined to act, the appointment of the two nephews would have been as operative and effectual, as if they had been solely and unqualifiedly named as executors.

But one of the brothers qualified and acted as executor: and both brothers being now deceased, the inquiry under consideration is narrowed to whether the substitution of the nephews is or is not to be denied to extend and to apply to existing circumstances; or whether the clause referred to is or is not to be held to have a restricted application, according to its first apparent or literal sense.

In *ex parte McDonnell* (2 Bradf., 32), which was a case of *constructive* appointment, it is observed that, though the executor can only derive the right to his office from a testamentary appointment, yet it is well established that this appointment may be either express or constructive: but that this, "like all other questions of testamentary construction, is a question

FOSDICK v. DELAFIELD.

the plain terms in which the appointment of the executors was made, and hence failed to give due effect to the conditions in which the appointment of Lewis L. Delafield was expressed.

of intention to be ascertained from an examination of all the provisions of the will."

So here it would seem that the reason of the principle equally applies, and that whether the petitioner is entitled to qualify as an executor, is a question of intention on the part of the testatrix, to be ascertained from an examination of the particular clause, in the light of the whole will, and in view of the nature and purpose of that section of the will, and the office and functions intended to be conferred by it on the persons therein named. What was the necessity of any appointment? Did the testatrix intend to confine the execution of the powers of such an appointment to persons of her own selection, in whom she placed special trust and confidence, so long as any of the trusts arising under the will remained in force? Did she not intend to provide, as well as she could by substituted appointments, for the execution of the trusts by persons of her own designation, and to guard against either embarrassment in law from a vacancy or an administration of the continuing trusts by strangers? These are questions which must now be determined, and courts should and will give effect to what may be ascertained to be the intention of the testatrix in these respects.

Imperfect phraseology will not be allowed to defeat an intention in such a case, reasonably deduced from the instrument; and how rigorously rules of construction shall be applied, or in what direction a doubt should yield, may depend, it would seem, much upon the subject matter of the clause in question; that is to say, for instance, a difference may be recognized between provisions that affect rights of property, and those that relate merely to the incumbent who is to execute a trust, or administer the estate for the benefit of others, whose rights are in law unaffected, if there only be a competent trustee.

Where a testator appoints an executor and provides *that in case of his death* another should be constituted, on the death of the original executor although he has proved the will, the executor so substituted may be admitted to office, if it appears to have been the testator's *intention* that the substitution should take place on the death of the original executor, whether happening in the testator's life-time or afterwards (*Williams on Exec.* citing in *re Goods Lighton*, 1 *Hagg.*, 235).

In *Hartnet v. Wandell* (2 *Hun.*, 552,) which was a case of delegated appointment, which was not sustained, Justice Boardman says the appointment of an executor is a mark of personal confidence and trust, but the executor should be named in the will, or appointed, or by *necessary inference*; and referring to the statute as to whom letters testamentary

FOSDICK T. DELAFIELD.

I am aware that the authorities are numerous, to the effect that the intent of a testator is to govern the construction of his will (*Jackson v. Staats*, 11 Johns., 347; *Brandon v. Brandon*, Ct. of Appeals, MSS., 1876). A

may issue, he recognizes the validity of the appointment of a person who can be identified by process of *construction* or *implication* applicable to the language of the will, by inquiring whether the Surrogate has power to issue letters to a person not named in the will and who cannot be so identified.

In this case, are not the nephews of the testatrix, within the meaning of the statute, executors expressly named in the will or appointed by necessary inference, in a manner consistent with the authority and opinion of the court in *Hartnett v. Wandell*?

Giving full weight and consideration to judicial decisions bearing on this case, and to the statute which provides to whom letters testamentary may issue, as the same is construed by our courts, it would seem to follow that the two nephews of the testatrix are entitled to qualify as executors, if it can be determined from the clause in question in connection with the whole will, that it was the intention of the testatrix, that they should act as executors upon the death of the two brothers, even though they or either of them survived the testatrix and qualified under the will; for if the clause is construed to express or imply that intention, then the nephews were named in the will as executors, within the meaning of the statute.

On that point, it is to be kept in view that there were express trusts of money for investment by the executors for the lives of several persons, and if the appointment of an executor as such for ordinary purposes of the possession of the estate, for the payment of debts, and thereupon to distribute the estate, is a mark of personal trust and confidence; the same may be said, *a fortiori*, where there are trusts such as this will creates.

It is fairly to be regarded that the testatrix, in appointing two of her own brothers executors, and, contingently her two nephews, desired that the trusts of her will should be executed by her own near relatives; and the substituted appointment evinced her desire that, among her nephews, these particularly named should act as her executors. That desire has its expression in the will as her *intention* and *direction*.

If such was her wish, can any reason be believed or supposed to exist for intending that the two nephews should assume the trust, as a mark of her confidence, any less because the two brothers, or either of them qualifying, died while in the execution of the trust?

There seems to be no rational explanation of a distinction in the mind or intention of the testatrix to make the choice of her nephews to depend on the occurrence of the deaths of the brothers before or after her-

FOSDICK v. DELAFIELD.

court is bound to find out the intention of a testator, if it be possible so to do, however artificially the will may be expressed (1 *Stat. at Large*, 699, § 2). "But," says Mr. REDFIELD in his work on Surrogates, page 129, "this

self, or if surviving, on their or either of them qualifying and afterward dying before the trusts were fulfilled. And if this is so, such an intention cannot be regarded as *probable*; so that the intention of such a distinction as would now deprive the nephews of the executorship may be considered as without reason and alike improbable and unnatural.

Yet it is true that courts must in some cases give effect to provisions that are obnoxious to criticisms of such a character. But under this will, there appears to be ground for a reasonable doubt of the meaning of the clause in question; and while courts are not required to strain after probate of a will, there may, and should properly, be an effort to reconcile a will in all its parts, and to give that meaning which is most in harmony with reason and natural probabilities, if the *intention* of the testator is in question; and it is now the province of the court to say whether the words "prior to my decease," in the nominating clause, in case both of the two brothers of the testatrix die, may not, in construction, be overlooked or discarded as superfluous, or as an imperfect attempt to define the time of decease, when unnecessary and incomplete, as not referring to the possible death while in the execution of the trust; or in other words, whether the event of death was not the contingency, and not the time it happened, or whether it was not an accidental and not an intended omission to refer to the decease of the brothers after qualifying as executors.

It seems to me that, in the mind of the testatrix, it was the *event* of the death, whether prior or subsequent to the decease of the testatrix, that she intended as the contingency which would render the appointment of her nephews effectual. This inference is founded on the clause referred to, taken in connection with the other contents of the will, and on the nature of the trusts and the relationship of the appointees, as before adverted to. (See *Parks v. Parks*, 9 *Paige*, 107.)

It is an established rule in the construction of wills, that where it is evident the testator has not expressed himself as he intended and supposed he had done, and the defect is produced by the omission of some word or words, and when it is certain, beyond reasonable doubt, what particular words were thus omitted, that may be supplied by intendment and the will read and construed as if those words had been written in the place or places where they were intended to have been. (*Redfield on Wills*, p. 453; and per Lord MANSFIELD in *Clements v. Parke*, 3 *Doug.*, 384.)

This case, it must be acknowledged, is not free from doubt, but in view of all the circumstances presented, there appears to be sufficient ground to permit the petitioner to qualify as executor and to receive letters: but

FOSDICK v. DELAFIELD.

intention must be discovered from the words of the will, and not from extraneous circumstances, and the court must proceed upon the known principles and established rules, not on loose conjectural interpretations or by considering what a man may be imagined to do in the testator's circumstances." The intention of the testatrix is therefore to be gathered from the words of the will, free of conjecture, under the guidance of precedents and rules of law. (*Myers v. Eddy*, 47 Barb., 263; *Terpening v. Skinner*, 30 Id., 373, and cases cited.) Where the words of a will are plain, the intent always follows. The will cannot be added to, nor its omissions supplied. (*Cheeseman v. Wilt*, 1 Yeates, 411; *Cole v. Rawlinson*, 2 Salk., 236.)

That the intention of the testatrix ought to govern, where it can be discovered, is a good rule; but wherever the will is plain, unequivocal and in technical law language, it is unnecessary to resort to that rule of construction (*Carri v. Jeannerette*, 2 McCord, 66). Constructions and interpretations of wills are not resorted to for the discovery of a testator's intention, when he has used none but plain, unequivocal expressions. (*Theall v. Theall*, 7 La. 220).

Although almost every rule of construction yields to the manifest intention of the testator, yet courts are not permitted to give an effect to his will, contrary to the plain and obvious import of the terms used by him, upon mere conjecture as to his intentions; and where he has made bequests to different children in terms which give them estates of different character in their

without prejudice in any manner or degree, by reason of the grant *ex parte* to a reconsideration of the whole matter, or to the rights of *cestuis que trust* or ultimate legatees of the capital of the trusts, if an application shall be made to revoke the letters, or their validity shall be otherwise questioned.

In like manner, as stated, Edward Delafield should be allowed to qualify and receive letters, if he shall so elect.

FOSDICK v. DELAFIELD.

respective legacies, the bequest to each must take effect according to its legal import, although no reason appears for having made the distinction between his children. (*Monigault v. Holmes*, 1 *Bailey S. C.*, 298) When a testator has used plain, explicit language, the court cannot reject the words upon the suspicion that he did not understand the import of the language used. (*Jenkins v. Van Schaack*, 3 *Paige*, 242; *Taylor v. Wendel*, 4 *Bradf.*, 324.) Where the meaning of the testator is apparent from the language of the will, its plain import can not be departed from, though it result in rendering the will invalid. (*Van Nostrand v. Moore*, 52 *N. Y.*, 12.)

From these numerous and well considered authorities, I deduce the obvious and reasonable principle, that where the testator has used plain and proper language to express his intention, and there are no ambiguities, nor any other provisions of the will contrary to, or inconsistent with, the language used, the court has no authority to look outside of the terms of the will for the expression of the intention of the testator. Much less should the court assume to conjecture what the testator intended, independent of the language, or base its construction of the instrument upon its notion of what ought to have been the intention of the testator.

In order to sustain the construction put upon this will by the late Surrogate, and by the counsel who is the alleged executor and is sought to be removed, the words "prior to my decease," must be ignored, while these words are entirely unambiguous, and express a fixed and plain condition which has not occurred in the case under consideration.

If the court were at liberty to say that there was no propriety in making such limitation or condition, and that the purpose of the testatrix was or should have been

FOSDICK v. DELAFIELD.

to retain the administration of her estate in the family, and that it was entirely immaterial to her whether the appointed executors should die before or after her decease, then it would assume to make a will for the testatrix, instead of giving a construction to that already made by her.

The words in the will in question, "prior to my decease," are plainly significant of a condition; and I can not perceive, after the most careful examination of the instrument, any provision therein which indicates a contrary intention, or any thing suggestive of a consideration by the testatrix, of the advanced age of the instituted executors, or of the youth of those substituted, or any thing which makes the appointment of her relatives a controlling element in the making of her testament.

Where the language used is consistent with the other provisions of the will, though it may leave contingencies unprovided for, and may seem to the court to be without sufficient reason, yet to attempt to adjust the language or interpolate or omit terms, according to its notion of what the testatrix should have done, would be to arrogate to itself the prerogative of testamentary disposition, which, under the law, belongs to the testatrix alone.

I might have contented myself with a disposition of this proceeding on the objection taken by the so-called executor, that the petitioners show no interest in this proceeding, and have no standing in court for the purpose of invoking a revocation of letters testamentary; but the principal question has seemed to me of considerable interest and importance, and I have felt unwilling to decide the question upon a technicality, and leave unconsidered the grave question of law which should be settled for the purposes of future proceedings.

The petition alleges no interest in the petitioners,

FOSDICK v. DELAFIELD.

except by virtue of their appointment and qualification as executors of the executor of the estate in question, and the alleged possession by them as such, of certain trust funds of this estate.

By sec. 17 of 2 *Stat. at L.* 73, it is provided that "no executor of an executor shall, as such, be authorized to administer on the estate of the first testator; but, on the death of the sole or surviving executor of any last will, letters of administration, with the will annexed, of the estate of the first testator left unadministered, shall be issued in the manner and with the authority thereafter provided." It is, therefore, entirely clear that the petitioners in this matter, by virtue of their office as executors of Henry Delafield, have no interest in this estate nor any control over its administration. By sec. 11 of 2 *Stat. at L.* 468, it is provided that an executor of an executor shall have no authority to commence or maintain any action or proceeding relating to the estate, effects or rights of the testator of the first executor, or to take any charge or control thereof as such executor. (*Theological Sem. of Auburn v. Cole*, 18 *Barb.*, 370; *Shook v. Shook*, 19 *Id.*, 653; *Campbell v. Browne*, 5 *Paige*, 36.)

The learned counsel for the petitioners, on the argument, suggested that the petitioners had a standing in court for the purposes of this proceeding, because they were possessed of certain property belonging to the estate of the testatrix, and that they had a right to know who was the proper representative of her estate in order that they might safely deliver the same. But it seems to me that a sufficient answer to that suggestion is the statute last cited.

It may be that on an application for the funds of the estate in their hands, they could raise the question as to the authority of the applicant to receive, but it is

MATTER OF MOUNT.

clear to my mind that they have no such status as will enable them to invoke a revocation of the letters in his case; certainly no such interest is shown by their petition. The petition must therefore be dismissed, with costs to be paid personally by the petitioners, under the authority of *Shook v. Shook* (19, *Barb.*, 653).

Order accordingly.

NEW YORK COUNTY—HON. D. C. CALVIN, SURROGATE.—DECEMBER, 1876.

MATTER OF MOUNT.

In the matter of the Estate of ALFRED R. MOUNT, deceased.

Executors, administrators or trustees, charged with loss resulting from their neglect to make regular investments of a fund, are entitled to commissions on the amount so charged.

Executors and administrators are entitled to commissions on a debt due to themselves from the decedent, and presented and allowed on their accounting.

Where a will gives a specified sum on trust for the life of a beneficiary, with remainder over to another, the commissions for paying income to the beneficiary for life are properly chargeable to the body of the estate, in the absence of any indication in the will that the commissions were to be charged on the income.

The executor does not waive his right to commissions on the income, by paying it over in full to the beneficiary for life.

THIS was a further decision of incidental questions involved in the matter of the estate of Alfred R. Mount, deceased, on which the decision of the main questions is reported *ante*, p. 547.

JNO. W. C. LEVERIDGE, *for the executor.*

THE SURROGATE.—On the question of allowance of commissions on the loss allowed for the non-conversion

MATTER OF MOUNT.

of stocks, &c., I entertain no doubt of the right of the trustee to charge commission. The charge made was for the purpose of restoring the fund to the condition and amount it would have reached if the trustees had performed their duty; and surely, in that case, they would have been entitled to commissions, and as is well said in *Meacham v. Sternes* (9 Paige, 404), "it is certainly sufficient punishment of the trustee for his negligence to compel him to account for the moneys which he might have collected, in the same manner as though the same had actually been received by him."

The same case settles the question in respect to the amount of the note allowed. The learned Chancellor says at the same page, "neither does there seem to be any good reason for depriving the trustee of his half commissions upon the debts due to himself, &c."

An examination of the case *Van Bokkelen v. Taylor* (92 N.Y., 105), does not change my opinion in respect to the validity of the note in question, and the sufficiency of the seal; and the suggestion made by the learned judge in that case, that there is nothing in the case to show that the stamps were not used as seals, indicate that it was the opinion of the court, that if used as seals, they would have been sufficient to create the instrument in question, a valid instrument. This satisfies me that my conclusion in this case was right; if not, the party must be put to his review by appeal.

Objection is also made to the allowance of commissions upon the income on the trust fund paid to four children under the will. The fact is that the testator bequeathed \$5,000 each in trust for his four children for life, the remainder over to other parties, and it is suggested that the body of the estate should not be charged with commissions upon the amounts paid to such life tenants.

MATTER OF MOUNT.

To test this question, suppose the respective trust funds had been bequeathed directly to the four children respectively, instead of in trust, to pay the interest to them; they would then evidently be entitled to the full amount of their legacy, undiminished by commissions, and yet the executors would be entitled to commissions for the payments, but the commissions would be charged to the body of the estate; and I am unable to perceive any good reason why the income payable to them should be diminished by a charge of commissions in favor of the executors or trustees. It seems evident that the interest and income was intended to be paid to the children and beneficiaries, undiminished by any charges for the administration of the estate; and upon reflection, I am of the opinion that the trustees are entitled out of the residuary estate to be paid their commissions on the annual income paid to said children, and that their payment of the full amount to them, was in strict conformity to the provisions of the will, and their official duty, and that thereby they waived nothing by the way of commission.

Order accordingly.

GREEN v. GREEN.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JANUARY, 1877.

GREEN v. GREEN.

In the matter of the Estate of J. H. GREEN, deceased.

Shortly before his death, the decedent hired premises for three years, by parol agreement, a lease being drawn up, but not signed; and he entered and made valuable improvements.

Held, that the lease being enforceable in equity, should be deemed an asset, for the whole term.

An administrator who renews or continues, in his own name, a lease held by the decedent, may be required to account for its full value as an asset.

Interest should be charged on such value only after the expiration of eighteen months from the issue of letters.*

THIS proceeding was instituted by the children, and next of kin of J. H. Green, deceased, to compel an accounting by the administrator, and the payment of the distributive share of the applicants.

An account was rendered, to which objections were filed, and a reference was had, and the referee made and filed a report.

To this report, the next of kin excepted, because the auditor declined to charge the administrator with the sum of \$1,500, inventoried for a certain lease with interest thereon from the date of the inventory.

The facts appear to be as follows: The intestate entered into an agreement, which was verbal, for a lease for three years, of premises in 8th Avenue, New York, with one Wheeler. A written lease was drawn up, and contained certain covenants for expensive repairs by the tenant, but it was never signed by the parties, and remained in the lessor's hands.

* See *Gillespie v. Brooks*, ante p. 392.

GREEN V. GREEN.

The decedent, however, went into possession of the premises, and made expensive repairs, and paid rent until the time of his death, which occurred before the end of the first year.

When the administrator was appointed, at his request, the landlord made a memorandum at the foot of the unsigned lease, giving substantially the same privileges to the administrator by name, and the paper which was delivered to the administrator was signed by the lessor, and that delivered to the lessor was signed by the administrator, in his own name, without adding "Administrator."

The administrator, under this arrangement, remained in charge of the premises, paying rent, and rendered accounts to the lessor, signed by him as administrator.

On the part of the administrator, it was claimed that as the lease was unsigned, the tenancy was only valid for the first year, and that the estate was only entitled to the benefit for the balance of the first year after the decease of the intestate, and that it was chargeable with the amount of the repairs made by the administrator pursuant to the terms of the agreement, during the remainder of the year, which practically takes from the estate, the amount at which said lease was inventoried, it having been included in the inventory, upon the assumption that it continued for three years.

On the part of the next of kin, it was claimed that the administrator having taken possession under the memorandum, it was for the estate, and that he took it in the interest of the estate, and that he should be charged with the appraised value, and with interest thereon from the date of the inventory.

H. FOX, *for the administrator.*

MCDANIEL, LUMIS & SOUTHER, *for next of kin.*

GREEN F. GREEN.

THE SURROGATE.—It seems to be quite obvious that if the lease in question had been duly executed, and in all respects valid, the estate would have been entitled to its value, and the fact that the intestate went into possession, and made valuable and expensive improvements under a verbal agreement, with the knowledge and permission of the landlord, renders it highly equitable that the lease for the whole term should be credited to the estate. It was such an agreement as equity would have required to be executed specifically, for the occupancy, and making of the improvements by the intestate upon the faith of a continuance of the lease for three years, was such a part performance, as in my opinion took the case out of the statute of frauds.

In *Parkhurst v. Van Cortland* (14 *Johns.*, 15), it was held, after an elaborate examination, that persons who went into lands, and made improvements, had so partly performed the terms of the agreement as to take the case out of the statute, and that the court would decree a specific performance of the agreement.

In *Traphagen v. Traphagen* (40 *Barb.*, 537), it was held that in an action of ejectment the defendant might rely upon the equitable defence that he had entered into possession under a parol contract for the purchase and conveyance of the premises, and remained in possession, and fully performed the agreement on his part; and would be regarded as the owner of the land, and entitled to the specific performance of the agreement.

In *Bennett v. Abrams* (41 *Barb.*, 619), it was held, that where possession had been taken by both parties, under an oral agreement for exchange of land, and one of them had fully performed on his part, and the fairness of the agreement was not assailed, he might maintain suit in equity to enforce a specific performance of it by the other party.

GREEN v. GREEN.

In *Malins v. Brown* (4 N. Y., 403), it was held that where a party had paid money upon a contract within the statute, and the delivery of the money would not restore him to his former situation, he was entitled in equity to a specific performance of the contract. (*Brown v. Jones*, 46 Barb., 400; 1 *Story Equity Jur.*, § 763.)

Under these authorities, I entertain no doubt that the intestate's estate, at his death, was entitled to the benefit of the lease in question for the balance of three years.

In *Mitchell v. Reed** (61 N. Y., 123), it was held that a member of a copartnership cannot during its existence, without the knowledge of his copartners, take a renewal of a lease for his own benefit of premises leased by the firm and upon which it has made valuable improvements, and the joint efforts of the members made the good will valuable, and enhanced the value of the premises, and this, although the term of the renewal lease did not begin until after the copartnership has expired by its own limitation. Commissioner DWIGHT says: "A guardian, we may suppose, holds a lease in his official character, which is to expire at his ward's majority. While the relation of guardian and ward exists, he takes a lease to himself to commence at the termination of the existing lease. Could that be sustained? Has he not profited by the trust relation? When he takes a lease to himself, can a tenable distinction be taken between one commencing immediately, and one beginning at a future day, even though that day be postponed until the trust relation expires? The sound rule is, that he cannot make any profit to himself from a secret transaction initiated while the relation of trustee and *cestui que trust* exists, no matter when it springs into active operation."

*Reversing 61 Barb., 310. See also *Struthers v. Pearce* (51 N. Y., 357).

GREEN v. GREEN.

In *Gardner v. Ogden* (22 N. Y., 327), numerous authorities are examined by Mr. Justice DAVIES, and the principle announced is, that a trustee can never be a purchaser, and a guardian, trustee, or other person standing in the relation of a fiduciary capacity, cannot deal with, or purchase the property in reference to which he holds that relation. (*Forbes v. Halsey*, 26 N. Y., 53.)

It seems to me, under the well-settled rule in such cases, that the administrator had no authority or right to avail himself of the lease in question by procuring its continuance in his name, at the expense of the estate, and that there was a subsisting right for the whole term, and that the statute of frauds has been obviated by the performance on the part of the intestate, and the acquiescence of the lessor; and the more especially is this so, as the lessor made no claim to the premises by reason of the non-signature to the lease, and did not avail himself of the statute.

It is equally clear that the administrator procured the instrument from Wheeler, at the foot of the lease, containing the terms and the privileges of the verbal agreement on his own account, securing the rights of the estate to himself, which he was bound to protect as the representative of the estate.

It is proved undoubtedly that he, as representative of the estate, could not continue the occupancy of the premises, during the term provided by the verbal lease in the name, and for the benefit of the estate; yet it was his duty, as its representative, to convert the interest of the estate in it, into money, and when he assumed to occupy the premises as an individual, he should be charged with the value of the lease at the time when the inventory was made, as much as though it had been sold by him as an asset of the estate.

GREEN v. GREEN.

I am, however, not able from the facts presented, to hold that the administrator is chargeable with interest upon the sum so inventoried, from the date of the inventory, for if it had been converted immediately into money, the administrator would not necessarily be chargeable with interest, because the exigencies of the estate might render it necessary that he should hold, or use it.

But as the law prescribes the period of 18 months as the ordinary limit for final settlement of the accounts of the administrator, I am of opinion that interest should be charged from the expiration of the 18 months after letters of administration were issued. Let the auditor's report be modified by charging the administrator with the sum of \$1,500, the amount inventoried for the lease, with interest thereon to the date of the decree, from the expiration of the 18 months aforesaid, and in all other respects let the auditor's report be confirmed.

Decree accordingly.

CARMAN v. COWLES.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JANUARY, 1877.

CARMAN v. COWLES.

In the matter of the final Accounting of R. CARMAN COWLES and JOSEPH F. DONNELL, surviving trustee of CHARLES E. CARMAN, under the last Will and Testament of RICHARD F. CARMAN, deceased.

On the final settlement of an account rendered by testamentary trustees, the Surrogate has power, upon written consent of the parties who have appeared, to distribute or apportion undisposed of assets or securities, among the parties in interest, in the same manner as on an accounting by executors and administrators.

Whether the practice that has prevailed, of allowing such distribution in case of securities over due, is sanctioned by the statute, *query*?

The guardian of an infant has no power to give the consent required by the statute, for the distribution, in kind, of unsold assets, unless authorized by a competent tribunal.

The Surrogate's Court has not power to grant such authority where the guardian is one appointed by another court.

The incidental powers of the Surrogate's Court are only such as are reasonably necessary to carry out the provisions of the statute, and such as may be inferred from its language to be necessary to accomplish its objects.

THIS was a proceeding for the final accounting of R. Carman Cowles, and Joseph F. Donnell, surviving trustees, &c., of Charles E. Carman, under the last will and testament of Richard F. Carman, deceased.

The facts material to the decision were as follows:

Richard F. Carman died in July, 1867, leaving a will which was duly probated, whereby among other things there was devised and bequeathed to the trustees therein named as executors, one equal one third share of the residue of his estate in trust for his son Charles E. Carman, during his natural life, and after his death to his children equally, &c.

In 1870, the executors accounted, and they were

CARMAN v. COWLES.

directed to set apart, and keep invested, \$305,504.97, one third of the residue of the estate, for the benefit of Charles; whereupon they proceeded to execute and carry out the trust until the death of one of the trustees, in September, 1872. Since then, the survivors continued so to do. On the 9th day of September, 1876, Charles died, leaving two children, Lucene Gunning, an adult, and Richard F. Carman, an infant.

On application to the Supreme Court, Rebecca B. Carman was appointed guardian of the person of Richard F. Carman, and the United States Trust Company, and the Union Trust Company, of the City of New York, were appointed guardians of his estate.

It appeared by the account now rendered that there was an estate of about \$290,000 thus to be transferred by the testamentary trustees, one half to the adult, Lucene Gunning, and the other half to the Trust Companies appointed by the Court, and that a very large proportion of the assets consisted of twenty three mortgages upon real estate in the upper part of the city. It seemed to be admitted by all parties that an attempt to convert these mortgages into money by foreclosure would result either in ruinous sacrifice to the *cestuis que trustent*, or in the necessity of bidding in the property on foreclosure; and it was also represented by all parties interested, to be very desirable that in order to avoid this sacrifice there should be a division of these securities between the respective *cestuis que trustent*. The question submitted to the court was, whether such division could be made under the circumstances.

DE WITT, LOCKMAN & KIP, *for the executors.*

— — —, *in opposition.*

THE SURROGATE.—By section 72, 2 *Statutes at Large*, 97, (marginal paging, 93,) it is provided that on

CARMAN v. COWLES.

final settlement by an executor, or administrator, the Surrogate may order, *upon the consent in writing* of the parties who shall have appeared, the delivery of any personal property which shall not have been sold, and the assignment of any mortgages, bonds, notes, or other demands not yet due, among those entitled to payment, or distribution, in lieu of so much money as such property or securities may be worth, to be ascertained by appraisement and oath of such persons as the Surrogate shall appoint for said purpose.

By section 66 (of 2 *Statutes at Large*, 97,) it is provided that a trustee, testamentary or appointed by any competent authority to execute any trust created by any will, &c., may render and finally settle his account before the Surrogate, in the county where the will was proved *in the manner* provided by law for the final settlement of the accounts of said executor, or administrator, and that the decree of the Surrogate on such final settlement may be reviewed in like manner, and that such decree shall have the same force and effect as a decree or judgment of any other court of competent jurisdiction on final settlement of such accounts.

I am of the opinion that by the latter section, the accounting by trustees, including the decree, may be conducted, and made in the same manner, and that the undisposed of securities may be distributed in kind, on like consent, as provided in section 72 above cited.

But it should be observed that section 72 above referred to, uses the term *personal property* evidently as tangible property, as contra-distinguished from securities, and that the authority to distribute securities in lieu of so much money, seems to be limited to such as are not due at the time of the consent and decree; and it is a very serious question whether securities past due, can be thus distinguished under the authority of that section.

CARMAN v. COWLES.

There may be, and doubtless was, in the minds of the revisors, a good reason for providing for the distribution of unmatured securities, which would be likely to occasion a sacrifice in the event of a forced sale, while the presumption would be, that securities past due might be enforced by executors, or administrators by legal proceedings in the usual way.

Though I am not able to find any adjudication upon this subject, and the practice of this office, as I am advised, has been otherwise, yet it seems to me that the words, "not yet due," limit the power of distribution to such securities.

In this case it does not appear whether the mortgages in question are past due, or not.

If, however, I should feel disposed to follow the practice hitherto prevailing in this Court, upon this subject, the next important question which arises is, as to the authority of the general guardians of the infant in this matter, to consent in writing to the distribution asked for; and that question involves the authority of a general guardian in respect to the rights of his ward.

While acting within the scope of his power, a guardian is only bound to fidelity and ordinary diligence and prudence, in the execution of the trust (*White v. Parker*, 8 Barb., 48). Where a guardian invests money of his ward in promissory notes of a person in good credit, and takes what he regards as reasonable security for its payment, he is held to act in good faith and with sound discretion; and although the maker of the note fail and the securities become inadequate to its payment, the guardian is nevertheless not responsible for the loss. (*Lovell v. Minot*, 20 Pick., 116.) In *White v. Parker* (*supra*), it is held substantially that a guardian cannot compromise a claim due to his ward with a former guardian, and consent to his discharge; and at page

CARMAN F. COWLES.

27, Mr. Justice MULLET, says: "The question in such a case is, not whether the guardian intended to defraud his ward or not, or whether the disposition which he made of his ward's property was beneficial or not, but whether he had power to bind his ward by such transaction, without his consent; and if he had not such power, a ward is not bound by the act of a guardian."

In *Lathers v. Fish* (4 *Lans.*, 213), it is held that the guardian of an infant cannot submit a controversy under section 372 of the code; and Judge LEARNED, in discussing the question at page 214, says: "It is a well-known principle that no guardian in an action is to be allowed to make any admission in behalf of infants. Whenever infants are a party to an action, the facts must be proved against them." In *Battell v. Burrill* (50 *N. Y.*, 13; affirming 10 *Abb. Pr. N. S.*, 97;) it is held that a general guardian has no power, under the act of 1833, incorporating the village of Brooklyn, to consent to the taking of property for opening of a street. Indeed, the authorities are numerous that a guardian may not admit a cause of action, or consent to a bill taken by confession.

I am of the opinion after careful reflection, and such diligent examination of the authorities as I have been able to make, that the general guardian has no power to consent to the distribution of the securities in this matter, pursuant to the 77th section of the *Revised Statutes*, above cited, by virtue of his office, without the authority of some competent tribunal permitting him to do so.

The fact that the section of the statute above cited, provides for such distribution by executors and administrators, and, as I am inclined to hold by analogy, testamentary trustees, requires the consent of the parties appearing, is satisfactory to me that there is no such power without that consent.

CARMAN v. COWLES.

Has this court such control over the guardian in question as to authorize him to consent, or to make his consent valid in such a case?

It is quite common for attorneys to urge that this court has all the powers of a court of chancery in such a proceeding, but such is not the case. It is true the 2d *Revised Statutes*, page 221, section 1, which provides that the powers conferred upon this court should be exercised in the cases, and in the manner prescribed by the statute for the Surrogate's Court, and in no other, and that no Surrogate should under pretext of incidental power, or constructive authority, exercise any jurisdiction whatever, not expressly given by some statute of this state, was repealed by chapter 460, of the laws of 1837, section 7; yet the effect of that repeal only gave to a Surrogate the powers which he possessed theretofore, which were incidental and necessary to a proper exercise of the functions of the court. (*Sipperly v. Baucus*, 24 N. Y., 46; *Brick's Estate*, 15 *Abbott Pr.*, 12.) But this court is of peculiar and special jurisdiction, and can only exercise the jurisdiction and powers, which by a favorable construction of the statute may be found to have been conferred upon it. (*Sibley v. Waffle*, 16 N. Y., 180; *Cleveland v. Whiton*, 31 *Barb.*, 544.) But the incidental powers are such as are reasonably necessary to carry out the provisions of the statute, and as may be inferred from its language as necessary to accomplish its objects.

It is quite clear that there is no power in the court to enlarge the authority of a general guardian, or to authorize him to do what he might not do, without that authority, in this case, for the guardians of the infant in this matter were appointed by the Supreme Court. I am of the opinion that this Court has no authority over such guardians, at the present time, for they are

CARMAN v. COWLES.

the officers of a different tribunal, and do not come within the jurisdiction and authority of this Court by virtue of such appointment, or of any claim to property under the authority of their appointment.

When they shall become possessed of any portion of the estate in question, then doubtless, in respect to that estate, they will come within the authority and be bound by the order of this Court, in respect thereto, when made in conformity to the statutory authority thereof. By 2 *Revised Statutes*, 220, section 1, subdivision 6, the Surrogate is given authority to administer justice in all matters relating to the affairs of deceased persons, according to the provisions of the statutes of this state.

It is quite clear that the Supreme Court, exercising equitable powers, and having general authority over the conduct of the guardians appointed by it, has the power to authorize guardians, in such a case, to consent to the distribution of the estate as proposed ; but as such distribution by this court is dependent upon the *consent* of the parties appearing, and as I am of the opinion that a general guardian, by virtue of his office, has no such authority, however beneficial it may appear to be for his ward, and as this court has no power to authorize such consent, I cannot resist the conclusion that I have no power to permit such distribution, so as to bind the infant, when he shall become of age, if he shall seek to repudiate such distribution.

I have reached this conclusion with great reluctance, and against a strong desire to reach a different conclusion, for the reason that it is entirely apparent that any attempt to foreclose the mortgages in question, or to convert them into money at this time, would result in serious loss to all the parties concerned.

And if this court possessed the general powers of a court of chancery, in such cases, I should not hesitate

SHEERIN v. PUBLIC ADMINISTRATOR.

to exercise it in the obvious interest of the infant; but in the absence of such authority, and of the required consent of the parties, I must deny the motion for distribution in kind of the securities mentioned.

Order accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JANUARY, 1877.

SHEERIN v. PUBLIC ADMINISTRATOR.

In the matter of the Estate of JOHN SHEERIN, deceased.

On the question whether the administrator was negligent in leaving testator's deposit in a savings bank, after the bank had suffered from "a run" until it finally became insolvent;—*Held*, that testimony of witnesses as to distrust expressed by depositors and others, was not sufficient to establish such general reputation for unsoundness as would raise a presumption of knowledge of its unsound condition on the part of the administrator, where all the witnesses who knew of its reputation and course of business, testified that they had confidence in it up to the time of its failure.

The object of the statute (2 R. S. 126 § 36,) requiring the public administrator to deposit all moneys by him "collected and received," within two days after the receipt thereof in an officially designated bank, is to secure the funds against loss by conversion by the administrator, or his indiscreet selection of a bank.

A bank deposit made by the decedent, whose book, only, comes to the hands of the administrator, is not money "collected and received," by him, within the meaning of the statute.

An administrator is bound to use such care and diligence as a business man would exert in the management of his own property. He is not liable for a loss occurring notwithstanding such care.*

The fact that a bank deposit was inventoried as cash, does not conclude the administrator and throw upon him absolute responsibility for the security of the fund.

The inventory may be shown to be incorrect, on a final accounting.

*As to the liability of the city for the acts of the public administrator, see *Glover v. Mayor, &c., of N. Y.*, 7 Hun, 232; as to who is entitled to interest upon deposits made by public administrator, see *Sullivan v. Herrera* (7 Hun, 309).

SHEERIN v. PUBLIC ADMINISTRATOR.

THIS was a proceeding for the final settlement of the accounts of the public administrator, in the matter of the estate of John Sheerin, deceased.

The public administrator filed his account of proceedings in this estate, and objections to the account were filed, and the matter was referred to an auditor who made his report, and the public administrator filed exceptions thereto. The exceptions material to the decision were, 1, to a finding of the auditor, that the public administrator should be charged with \$443.88, deposited in the Third Avenue Savings Bank, and with interest thereon; and, 2, to a finding of fact, in respect to the repute of said bank, and the public administrator's negligence in failing to withdraw the deposit from the bank. The alleged dereliction occurred under the administration of the late public administrator, Isaac Dayton, Esq.

The evidence showed that the deceased died April 22d, 1875, about which date his assets, which included two bank books, one in the Emigrant Industrial Savings bank for \$1,399.16, the other in the Third Avenue Savings Bank, amounting to the sum of \$443.88, came to the public administrator's hands. On the 29th day of September, in the same year, the latter bank failed, and it paid only a portion of the deposit, to wit: \$66.49, and the balance, \$377.39 was now assumed to be uncollectible.

Some proof was offered in respect to the reputation of the Third Avenue Savings Bank, in respect to solvency.

Christain H. Betjerman, an attorney, testified that the reputation of the Third Avenue Savings Bank was bad, since the run on it about a year previous to its suspension. On cross examination, he testified that he had never inquired of the officers of the bank, as to its solvency; that it continued to do regular business; he never heard of its being unable to meet its obligations; never saw the

SHEERIN v. PUBLIC ADMINISTRATOR.

annual report submitted in January, 1875. He derived his information from conversations with depositors, and people who wished to deposit money. One John Bush, a carman, told him he would take his money out from the bank; that one of the directors advised him not to do so; that in conversation with one Mrs. McCann, she stated she was a depositor, but she should draw her money from the bank, as she had heard that since the run, depositors were withdrawing, but he didn't believe she did withdraw her account; that he didn't remember any other depositors; that he conversed with Mr. Lessor Friedberg in the summer of 1875, who had some money he wished to invest; that witness advised him to put it in a savings bank and mentioned the Third Avenue Savings Bank; he said he would not trust the Third Avenue Savings Bank; that witness had an impression it was insolvent from the first run. On re-direct, he testified he had conversations with his father, whose opinion was the same as his.

Edward Timpson, called for the Public Administrator, testified that he knew about the Third Avenue Savings Bank; that there was a run on it some years ago, and afterwards it was all right again; that he didn't remember that the newspapers published articles about the Bank; that he heard it was drawing in its mortgages during the first run.

Richard C. Beamish, a witness called for the Public Administrator, testified that he lived near the Third Avenue Savings Bank many years; was a depositor at the time of its collapse; remembered the first run, had five or six thousand dollars in it, but did not withdraw it; that the reputation of the bank was good at the time, and afterwards; thinks the first run was four years ago; knew several directors; that his faith was not shaken in the bank, on account of the run.

SHEERIN v. PUBLIC ADMINISTRATOR.

Some testimony was given, showing that the intestate left his deposit in the Emigrant Industrial Savings Bank, to accumulate, and he was in the habit of withdrawing such funds as he needed from the Third Avenue Savings Bank.

L. H. ARNOLD, *for the public administrator.*

R. P. HOPE, *for the next of kin.*

THE SURROGATE.—I am satisfied that the referee erred in finding that the general reputation of the Third Avenue Savings Bank, for solvency, was bad at the times mentioned. The testimony given upon that subject seems to fall very far short of establishing a general reputation, which would raise a presumption of a knowledge of its unsound condition on the part of the Public Administrator. Indeed, on the evidence given before the auditor alone, I should not hesitate to find that the bank was in good repute in respect to its solvency, for it had withstood a very severe run upon it,—paid the demands, and continued its business; and those witnesses who were sworn, and knew of its reputation, and course of business, had confidence in its entire solvency, up to the time it finally suspended. But the first question for consideration in this matter is, as to the effect of the statute relating to the duty of the Public Administrator and the deposit of moneys by him “collected and received.” By section 36, of 2 *Statutes at Large*, 130, it is provided that the Public Administrator shall deposit all moneys by him “collected and received” within two days after the receipt thereof, in such bank as the common council shall designate, to the joint credit of himself, and the comptroller. It is claimed by the counsel for the objector, and approved by the finding of the referee, that the receipt by the public administrator of the bank book showing the deposit in

SHEERIN T. PUBLIC ADMINISTRATOR.

the Third Avenue Savings Bank, was money "collected and received," within that provision, and that it was his duty to have deposited the same in the Park Bank, which has been duly designated according to the statute, and that for that neglect he is liable to the estate for any loss resulting from non-compliance with that statute. The object of this statute undoubtedly is, to secure the safety of funds belonging to an estate which shall come into the hands of the Public Administrator, so that he may not use them for his own purposes, or deposit them in an unsafe bank, at his own discretion, and I am quite clear in the opinion that the fund deposited in the Third Avenue Savings Bank by the intestate, and evidenced by his bank book, did not, within any legitimate construction of the words, constitute moneys by him "collected and received." It had never been in his hands, and his having the means to draw it, cannot be even a constructive collection or receipt. If it were, then on presentation of the bank book, if the bank had declined to pay, and suspended the next day, the Public Administrator would be held to have collected what might in fact be an entirely worthless claim of the estate.

I entertain no doubt that the referee has fallen into an error in holding that the Public Administrator was liable for failing to deposit the money which was in the Third Avenue Savings Bank, in the Park Bank, within two days after his receipt of letters ; and that the money was never in the hands of the Public Administrator so that the same could have been deposited.

The next question to be considered is, whether the Public Administrator was guilty of neglect under the circumstances of this case, for his failure to draw the from money the Third Avenue Savings Bank before its suspension.

An administrator is bound to use such care, and dili-

SHEERIN v. PUBLIC ADMINISTRATOR.

gence as a business man would exert in the management of his own property, in order to collect claims against debtors of the estate (*Moor's estate*, 1 *Tucker*, 41).

In *Thompson v. Brown* (4 *Johns. Ch.*, 619) Chancellor KENT holds that executors and administrators acting in good faith, and without any wilful default or fraud, will not be responsible for the loss which may arise. (See *Schultz v. Pulver*, 11 *Wend.*, 361; *Ruggles v. Sherman* 14 *Johns.*, 446.) In discussing the question of a *devastavit* by an executor, *Williams on Executors* lays down the rule that an executor is not guilty of a *devastavit* provided he exercised fair and reasonable discretion on the subject. (See *Barn. & Ald.*, 360; *Williams on Executors*, 1539.)

In *Whitney v. Peddicord* (63 *Ill.*, 249), Chief Justice LAWRENCE, in discussing a kindred question, says: "When they have acted with reasonable diligence, and honest desire to do their duty faithfully, a mere error of judgment, in what was fairly a matter of judgment, or opinion, could not make them liable, merely because subsequent events have shown they did not pursue the wisest course; but on the other hand, they must be held to that degree of diligence which men ordinarily use in the management of their own affairs, and if through lack of that, the interests of the trust estate are damnified, they must make good the loss."

The case cited by counsel for the objector, *Cornwell v. Deck*, 8 *Hun*, 122, does not militate against the authorities and principles above cited. That was a case where the administratrix had kept money of the estate in a trunk, in a bed room occupied by her son, adjoining the store, for nearly a year from whence it was stolen, and the court held that, had only a portion of the money collected necessary for the use of the business been so kept, and the balance deposited in bank, it would not have rendered the administratrix liable; but in com-

SHEERIN v. PUBLIC ADMINISTRATOR.

menting on the case, Judge SMITH cites, with approbation, the case of the *Chambersburg Savings Association's Appeal* (76 Pa., 203), where it is stated that it is well settled that a trustee shall not be surcharged by a court of equity for a loss which has occurred, in case he has exercised common skill, common prudence, and common caution; but for supine negligence, and wilful default, he shall be held responsible. It is also urged by the counsel for the objector that the inventory filed by the public administrator, stated the amount of money in said bank to be assets, and in cash, and that he is estopped by his inventory. In this position he is clearly in error, for it often occurs that on a final accounting the inventory may be shown to be incorrect, and so be corrected in the final decree. (See 2 R. S. 440, §§ 14, 15; *Montgomery v. Dunning*, 2 Bradf., 220).

Having concluded from the evidence that there was no such general reputation of insecurity, on the part of the Third Avenue Savings Bank, as charged the Public Administrator with knowledge of that fact, and as it nowhere appears that he in fact knew of any suspicion in respect to it, and as the investment was made by the intestate, I am unable to find from the evidence that the Public Administrator was guilty of any negligence in permitting the fund to remain on deposit in that bank, for the time stated, or that he failed to take such care of the fund, as men of ordinary prudence would take of their own affairs.

This case is one of considerable interest and importance, not on account of the amount involved, but because it affects the conduct of a every responsible public officer; and for that reason I have felt it my duty to consider the question involved, with considerable care, with a desire, on the one hand, not to relax the rule of responsibility on the part of the Public Administrator,

SHEERIN v. PUBLIC ADMINISTRATOR.

and on the other, not to impose any such burthens as would either deter a competent and careful person from assuming its responsibilities, or imposing unjust liability upon him in the performance of his trust; and it seems to me that the rule adopted by the auditor in this case, would impose burthens entirely inconsistent with the nature of the office, and the trust reposed in him, and would, carried to its legitimate conclusions, render it impracticable to procure any competent and responsible person to accept the office.

In the consideration of this matter, I have weighed the distinction which properly grows out of the English doctrine and practice, denying executors and administrators compensation for their services, and that which prevails in this country, of compensating by commissions for such services, and the different responsibility which attaches by reason of the changed condition of the trust; but on such examination as I have been able to give the facts of this matter, and the authorities bearing upon the subject, I am unable to concur with the auditor in his conclusions.

I am of the opinion that in respect to the fund in the Third Avenue Savings Bank, the account should be settled as stated, and that the report of the auditor in that particular should be modified.

Decree accordingly.

MATTER OF MOKE.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JANUARY, 1877.

MATTER OF MOKE.

*In the matter of the final Accounting of the executors, &c.,
of the will of GEORGE LEWIS AUGUSTUS MOKE,
deceased.*

It seems that a cestui que trust under a will may be also trustee.

But since a *cestui que trust* is not altogether a fit person to be a trustee, if the will is ambiguous in this respect, the court will favor a construction which does not have such a result.

Testator named his wife "executrix," and other persons, executors and trustees, and the exercise of certain of the powers of the trustees were made conditional on the widow's consent. *Held*, that she was not made a trustee.

THIS was a proceeding for the final accounting of the executors, &c., of George Lewis Augustus Moke, deceased. Upon objection to the form of the decree in this case, the question was submitted, whether by the terms of the will, the widow, denominated executrix in the tenth clause, appointing her, was also made trustee under the will.

By the fourth clause of the will, the testator bequeathed to his executors thereafter named, \$150,000, in trust, to apply the income to the use of his wife during her life, and on her decease, to become part of his residuary estate. By the sixth clause, he devised the remainder of his estate, including the trust fund, to his wife, and upon her death, or in case she should die before him, unto his executors mentioned, in trust.

By the seventh clause, he empowered the executors or trustees, with the consent in writing of his wife during her life-time, and afterwards at their discretion, to raise any part not exceeding one-half of the vested

MATTER OF MOKE.

share of any of his children, and apply the same as an advancement for their benefit, as said trustees shall think fit.

The eighth clause authorized the trustees to hold existing investments, and certain specified securities, and what new investments should be made by them.

By the ninth clause, his wife was authorized to designate the investments to make up the sum of \$150,000, given in trust for her benefit, and the executors were directed to hold the same for that purpose.

By the tenth clause, his wife was appointed executrix, and his father-in-law, brother-in-law, and a friend by name, or such of them as might qualify as executors and trustees, were appointed executors and trustees, and his executors, or such as should qualify, were authorized to sell his real estate, under certain limitations, and to change investments and make compromises, &c.

By the eleventh clause, he constituted and appointed said executors, or such as should qualify, guardians of the person and estate of his children, and directed such executors who were thereby made trustees of the shares of his children, to apply the income to their use, education, and maintenance in such manner, and to such extent as they should deem expedient.

J. GIROUD FOSTER, *for the executors.*

THE SURROGATE.—The special guardian objected to the proposed decree, on the ground that it recognized the widow as trustee and testamentary guardian under the will, and directed the assets to be transferred to her, as well as to the executors who qualified as such. The latter are conceded to have been duly appointed by the will as trustees, and the special guardian claims that by the scheme of the will, it is deducible that by the use of the word "executor," and their appointment as trustees,

MATTER OF MOKE.

and guardians, the testator intended to exclude the executrix from such trusteeship, and guardianship; and in furtherance of this proposition, he claims that a different construction would constitute the widow both trustee and *cestui que trust* as to the sum of \$150,000, bequeathed for her benefit; which, it is urged, would be an inconsistent relation and contrary to law. To this point the special guardian cites the case of *Craig v. Hone* (2 Edw. Ch., 564), where the Vice Chancellor holds that the appointment of a trustee of a fund to which he is entitled as *cestui que trust* creates an invalid trust.

The will in question furnishes suggestions on both sides of the question raised by the objections of the guardian.

It is not easy to perceive any good reason why the testator should be willing to make his widow executrix, and still exclude her from the important and more natural position of guardian to the children; and the tenth clause of the will, which, after the appointment of the executrix and executors, empowers the executors or such of them as may qualify, to sell by public or private sale, or to lease for terms not exceeding five years, his real estate, would seem to invest a power of sale in the executrix and executors; for I can perceive no reason why he should appoint his widow executrix, if she were not to participate while acting as such, in the disposition of the estate, both real and personal. I can conceive very substantial reasons why the testator might be willing to make his wife executrix, and yet not make her trustee, as she would thus become trustee for herself.

It is a very common occurrence that wills are made bequeathing certain property in trust for the widow, among other provisions, and she made sole executrix, and of course the executrix would hold the property as

MATTER OF MORE.

trustee for herself, as well as the other beneficiaries under the will; and while it may be conceded that there is some inconsistency in the vesting the estate or title of both trustee and *cestui que trust* in the same person, yet I am not prepared to concur with the learned Vice-Chancellor in the case of *Craig v. Hone*, above cited, that the appointment of such trustee is illegal, or void.

Perry, in his Treatise upon Trusts, section 59, says, '*cestuis que trustent* are not incapable of taking in trust for themselves and others, but they are not altogether fit persons to be appointed by reason of a possible conflict between their duty and interest.'

It is not difficult to conceive a state of facts under the will in question, where the pecuniary interests of the widow and the children might be hostile.

In *Wetmore v. Truslow* (51 N. Y., 338), it is held that the bequest of personal property to four trustees, and the survivor of them, to keep the same invested, and apply the income to the use of one of the trustees, creates a valid trust, and that the income and the manner of its application are controlled not by a beneficiary but by the majority of the trustees. (See also *Tiffany v. Clarke*, 58 N. Y., 632.)

But the seventh clause of the will seems to afford somewhat strong evidence, that the testator intended to make a distinction between the executrix, and executors, and that he used the latter term, as contradistinguished from the former; for he gives to his executors and trustees, power to raise one half of the vested or expectant or presumptive shares of the children, &c., on the written consent of his wife. It is the words "consent of the widow" which would seem to indicate the intention to exclude her as trustee, for if she were a trustee, no such restriction would be neces-

MATTER OF MORE.

sary, since unlike executors, trustees must join in whatever is done in respect to the estate, in the execution of their trust; and if she was intended to be one of the trustees, she would hold as such with the power to refuse, or assent, which she would not possess as executrix, because an executor may act for the whole estate where he is joined with others. (*Ridgeley v. Johnson*, 11 Barb., 527; *Van Rensselaer v. Atkin*, 22 Wend., 549.) The case of *Magoffen v. Patton* (3 Edw. Ch., 65), would seem to indicate a different doctrine, and the Vice-Chancellor uses this language: "But the will is susceptible of a construction to exclude her (executrix) from being considered a trustee. The executors are named as such, while the *cestui que trust*, or defendant, is called in the will executrix; by giving the will a limited construction in this respect, she is not a trustee of the fund for her own benefit." While I am not prepared to assent to the authority of *Craig v. Hone* (above cited), which is substantially overruled by the above cases, yet I am inclined to think that a *cestui que trust*, in the language of Perry, above cited, is not altogether a fit person to be appointed trustee, by reason of the possible conflict between his duty and his interest, and this suggestion, taken in conjunction with the peculiar provisions of the tenth clause of the will, constrains me to hold that the executrix in this case was not made a trustee or guardian by the will in question, and that the decree should not recognize her as such.

In reaching this conclusion, I am not unmindful of the fact that it excludes from the guardianship of the infants, a person who from natural ties would be likely to take an interest in their welfare, and that there is difficulty in administering the trust in respect to the children, in consequence of their residing abroad, under the actual care of their mother, who, by this conclusion,

LYNCH v. MAHONEY.

is deprived of their guardianship, but as the appointment of the executors and trustees is made in the same clause, and the language of the will, as to the guardians, I do not feel justified in holding that the widow is made guardian, and not trustee.

Let the decree be modified in conformity to the above conclusion.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—FEBRUARY, 1877.

LYNCH v. MAHONEY.

In the matter of the Estate of EDWARD LYNCH, deceased.

General legacies, in their nature, carry interest.

Such interest is computed from the time at which the principal is actually due and payable.

The executor is allowed by law one year to prepare for payment, and interest runs from the expiration of the year, unless another period is fixed by the will.

But on a legacy declared to be in satisfaction of a debt, or, in some cases, for the maintenance of a child, interest is allowed from testator's death.

A bequest of interest upon a fund bequeathed in trust, to be invested, though payable to a person neither an infant nor a widow, is subject to the rule applicable to an annuity, and the interest runs from the date of testator's death.

ELIZABETH A. LYNCH, executrix of the will, &c., of Edward Lynch, presented her petition for leave to resign.

It set forth the following facts: the petitioner and Richard M. Harrison were appointed executors, but Harrison did not qualify. On 4th March, 1876, the petitioner obtained an order to advertise for claims, and did so. She paid all the debts presented, except \$80, and she believes there are no other debts unpaid. She paid all

LYNCH v. MAHONEY.

legacies excepting \$1,500, which she was directed by the will to hold in trust, and pay the income to Mrs. Ann Mahoney, during her life, and upon her decease, to pay said sum to her issue. The petitioner was the residuary legatee under the will, and believes herself to be entitled to the remaining assets of the estate, except the said \$1,500, and \$80, and whatever interest said Ann might be adjudged to be entitled to. She had paid said Ann \$52.50 on account of the interest, and was now desirous to be relieved from her trust. She accordingly prayed that she be allowed to pay the principal into this court for Ann's benefit, or that another trustee be appointed.

It was consented that the executrix be allowed to resign; and the only question submitted for the decision of the court was, when the interest on the sum left for the benefit of Ann Mahoney began to run.

The language of the will in that respect was as follows: "I give to the executors of this, my will, the sum of \$1,500, in trust, to invest the same, and pay the income thereof to my sister Ann, wife of Martin Mahoney, of Saratoga Springs, during her life; and upon her death to pay said sum to her children surviving her, in equal shares."

It was conceded by the parties that the personal property of the estate was not alone sufficient to pay the debts, but together with the rent of the real estate it was sufficient; that there was one parcel of real estate sold January 6th, 1877, for \$15,500, which sum, after deducting \$5,000, of a prior mortgage, paid the legacies, and left but \$5,000 to Mrs. Lynch. The legatee claimed interest from May 3rd, 1875, the date of the death of the testator; and admitted the receipt of \$52.50 on account. The executrix claimed that interest ran only from July 20th, 1876, a year from the date of granting letters.

LYNCH v. MAHONEY.

T. H. HURLEY, *for the executrix.*McDANIEL, LUMIS & SOUTHER, *for the legatees.*

THE SURROGATE.—The general rule is, that general legacies in their nature carry interest, and that interest is computed from the time at which the principal is actually due and payable, and the executor is allowed by law, one year from the testator's death to ascertain and settle his affairs, at the end of which time, the court, for the sake of greater convenience, presumes the personal estate to have been reduced into possession.

Upon that ground, interest is payable from that time, unless some other period is fixed by the will (*Wms. on Executors*, 1221). The exceptions to this rule are, that if a legacy is decreed to be a satisfaction of a debt, the Court always allows interest from the death of the testator. In the case of a legacy given to a child by a parent, or one *in parentis loco*, the court will give interest from the death, to create a provision for its maintenance. An annuity bestowed by will, without mention of the time of payment, is considered as commencing from the death of the testator, and the first payment due at the expiration of a year. As mentioned by *Williams on Executors*, (p. 1226,) in some instances, legacies payable at a future period will carry interest, although not given by a parent, or a person *in loco parentis*, where there appears an intention on the part of the testator, that the legatees shall be maintained out of the property bequeathed to them.

In the case of *Lawrence v. Embree* (3*Bradf.*, 364), it was held that annuities are considered as commencing to run at the testator's death, and the first payment is not due until the end of a year. A bequest of interest dividends, and income, of a certain sum to be vested by the executors, does not begin to carry interest until

LYNCH v. MAHONEY.

the end of a year, at which time the investment ought to be made; and it was held in that case, also, that the provisions of the Revised Statutes as to payment of debts and legacies, have not altered the common law rule, and that the delay of the probate does not deprive the legatees of interest on their legacies, after the expiration of a year from the testator's decease; and that where there is a gift for life, of the income of the residue, without any direction to invest, the tenant for life is entitled to the income from the testator's death, on such investments as were then made, or as were subsequently made within a year, together with interest, on the amount not invested, valued as at the time of testator's decease.

But, as is well said by Surrogate TUCKER, in the *matter of Fish* (19 *Abbott Pr.*, 209), the learned Surrogate, in holding that the Revised Statutes had not changed the rule as to the payment of interest, had doubtless failed to see the then very late case of *Bradner v. Faulkner* (12 *N. Y.*, 472), where the court of last resort held, that the statute in question having prescribed the time when legacies are payable, the interest should be held payable from the time when the legacies became so payable, for it is the non-payment at the time prescribed, which entitles a party to interest upon general legacies; and in the absence of a different provision, it would seem to be obvious that the interest should not be payable until the principal should be legally demanded. I am therefore of the opinion that the statute in question does change the common law rule in respect to interest upon general legacies; but the question submitted in this matter is whether a bequest of interest upon a fund bequeathed, in trust, to be invested, payable to a person neither an infant, nor a widow forms an exception to the general rule above stated.

LYNCH v. MAHONEY.

Surrogate BRADFORD, in *Lawrence v. Embree*, above cited, held substantially that it did not; but in the case of *Cooke v. Meeker* (36 N. Y., 15), DAVIS, C. J., held the authorities abundant to sustain the doctrine, that when a sum is left in trust, with a direction that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof, from the date of the testator's death. A careful consideration of the case, will show that there are some material differences between that case, and the one under consideration, which fully justify the conclusion reached therein, and which did not therefore render it necessary that the learned judge who delivered the opinion, should hold as above quoted. Indeed, that part of the opinion was clearly *obiter*; hence it becomes necessary to consider the cases which he has cited as authority for that conclusion, in order to determine its soundness. Mr. Justice BOCKES, in *Cooke v. Meeker* (*supra*), in speaking of the facts of that case, says, that the estate was more than sufficient to satisfy all the legacies. It was well invested on bonds and mortgages, drawing interest at the testator's decease. The executors were authorized to transfer existing securities in satisfaction of the legacies. One of the executors was made the trustee to take and hold the trust fund;—thus no new or special investment was necessary. The beneficiary was an infant with no other provision for her support, or means of support, so far as the case discloses. These facts constitute, as it seems to me, a material difference between that case and the present.

In that case, the Chief Justice says that the weight of authority, undoubtedly now is in favor of allowing the payment of annuities or incomes to commence at the testator's death; and he cites several authorities which I deem it my duty to examine with care.

LYNCH v. MAHONEY.

The first cited is *Craig v. Craig* (3 Barb. Ch., 76), which was the case of an annuity, and all the authorities concur that in such a case, where there is no direction as to the time when it shall commence, it commences at the testator's death. The next case cited is *Gibson v. Bott* (7 Vesey, 96), the marginal note of which is, that an annuity commences from the death, and the first payment is due at the end of a year; but a legacy does not begin to carry interest till the end of a year, unless otherwise directed, which is fully sustained by the text. The next is *Fearns v. Young*, (9 Vesey, 553), in which case the testator bequeathed to his wife the interest of one half of his property, during her life, with liberty to dispose of one half of said one half to whomsoever she might think proper, at her decease, the other half to devolve upon his daughter. The testator was a partner in a firm; and the articles of copartnership provided that, at the death of either partner, during the period limited for the partnership, seven years, the business should be carried on for the joint account of the surviving copartners, and the heirs of the deceased, until 30th June, next following, if death happened three months preceding, otherwise to continue till the same date, in the subsequent year, when the partnership should determine and the state of the partnership be made up, and divided, and the share belonging to the heirs should be paid, one half at the end of one year, the other half at the end of two years after such determination.

The Lord Chancellor in that case says, that it is not very well settled whether a tenant for life is entitled to interest from the death, or from a year afterwards; but in that case, he was of opinion that a life tenant ought to have interest, at a given rate, from the death, and determination of the partnership, and not the profit, and at the end of the partnership was entitled to interest upon the capital, though dead.

LYNCH v. MAHONEY.

The case of *Angerstein v. Martin* (*Turner & Russell*, 232), was a case where the testator devised lands to John Angerstein for life, remainder to his children. The residue of his personal estate, subject to the payment of debts, was to be laid out in the purchase of lands to be settled to the same uses, with a proviso that the trust moneys, until so invested, might be invested in government or real securities, and directed the interest to be paid as the rent of the lands, when purchased, would be payable. A large portion of the testator's personal estate, not required for debts and legacies, was invested upon securities, bearing interest. The tenant for life was held entitled to the interest of that portion, from the death of the testator.

In *Hewit v. Morris* (*Turn. & Russ.*, 241) the testator directed his executors to invest the residue of his estate, after paying debts and legacies, in funds, or securities, the interest to be paid to the tenant for life, and after his death, the principal to be held in trust for his children. It was held that the tenant for life, was entitled to interest accruing from a year next after the testator's decease, upon funds in which the testator's property stood invested at the time of his death, and which were not required for payment of debts and legacies.

In *Hill v. Hill* (3 *Vesey & Beames*, 183) it was held that a legacy to grandchildren, the object being for provision and maintenance, entitled the legatees to interest from the death.

In *Hilyard's Estate* (5 *Watts & Serg.*, 30), the testator gave and bequeathed unto his executors, \$1,000 in trust, to place the same out at interest in good securities, and to pay and apply the interest and income thereof, as the same should be got in and received, unto his sister during her life, and immediately after her decease, the principal sum to be equally divided between the children

LYNCH v. MAHONEY.

of his late brother. It appeared that the deceased left investments in bonds, mortgages, &c., bearing interest, amounting to over \$44,000. It was held that the sister was entitled to the interest for a year from the death of the testator. In that case the principle was stated to be that where a sum of money is bequeathed, it does not carry interest for a year from the death of the testator, because he is not bound to pay it before the end of a year, and this is the rule, although the personal estate is invested in funds drawing interest. But to that rule there is an exception, founded upon the intention of the testator, and the character and situation of the legatee, and other circumstances; but where the bequest is not of the *corpus*, but of an income or annuity, there a contrary rule prevails, and the legatee having an interest for life, is allowed interest from the death of the testator. (And see *Eyre v. Golding*, 5 Binn., 472.)

A careful examination of the treatises upon this subject, together with the decisions both English and American, leaves the question in very serious doubt, and but for the clear language of the learned judge in *Cooke v. Meeker*, above cited, and the two Pennsylvania authorities, I should be inclined to follow the decision by the late Surrogate BRADFORD, in *Lawrence v. Embree*; for when the principle is recognized that an executor has a year in which to make investments, and the will as in this case directs the investment of the principal, and it appears, as in this case, that the estate in question had no securities drawing interest, out of which payment could be made for the first year, and no investment was in fact made, and there is no suggestion that the executor has been derelict in the performance of his duty, in that respect—it seems to me that there is a substantial distinction between an annuity, as such, and the interest upon a sum to be invested, payable an-

LYNCH v. MAHONEY.

nually in this manner, although it does partake in some sense of the nature of an annuity. But an annuity is charged upon the whole body of the estate, while the interest directed to be paid by the will under consideration is only such interest as can be realized from the investment of that sum, and if it should be invested, and fail to yield an income, the estate would not be charged with the deficiency.

But I do not feel at liberty to disregard the plain and emphatic language of the learned chief justice in *Cooke v. Meeker*, which may be presumed to have received the attention and scrutiny of the other judges of the court, though it may not have been necessary to the decision of that case. The two Pennsylvania cases above cited are also directly upon the point involved in this case; and therefore while I am not able to resist the force of the argument to the contrary, above suggested, I feel constrained to respect the above authorities, and to hold that the interest upon the legacy in question began to run from the decease of the testator, and that the executor be directed to pay accordingly.

Order accordingly .

MATTER OF BLANK.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—FEBRUARY,
1877:

MATTER OF BLANK.

In the matter of the Estate of ———.

The public administrator has a right to administration with the will annexed in preference to the attorney in fact of disqualified next of kin, except where the will was made by a testator dying domiciled abroad, and was proved by exemplification of a foreign probate, under L., 1863, c. 403.

This was an application for letters of Administration with the will annexed.

THE SURROGATE.—By the provisions of 2 *Rev. Stat.*, 78, § 44, it is provided that if any one of several executors, &c., to whom letters testamentary shall have been granted, shall die, &c., the remaining executors shall receive, and complete the execution of the will according to law.

Section 45 provides that if all such executors shall die, &c., the Surrogate having authority to grant letters, originally, shall issue letters of administration with the will annexed, to the widow, or next of kin, or creditors of the deceased, or others, in the same manner as therein directed; in relation to the original letters of administration.

By section 14, it is provided that if all the persons named in the will as the executors, shall renounce or neglect to qualify, or be legally incompetent, then letters testamentary shall issue, and administration with the will annexed be granted to the residuary legatees, or some or one of them, if there be any; if there be none that will accept, then to any principal or specific legatee;

MATTER OF BLANK.

if there be none that will accept, then to the widow, and next of kin, or to any creditor of the testator, in the same manner, &c., as letters of administration in case of intestacy.

Some discussion has arisen as to the effect of section 45, whether in case of administration with the will annexed, section 14 prescribes the persons entitled in their order, or whether section 45 is to be taken literally as giving the right to the widow, or next of kin, or to creditors, in their order; but the question submitted to me does not involve this dispute.

By the provisions of 2 *Rev. Stat.*, 74, § 27, as amended by chapter 782, section 6, of the laws of 1867, preference is given over creditors to the public administrator of the state of New York.

The language of section 45, 2 *Rev. Stat.*, 80, provides for the issue of letters of administration with the will annexed in the same manner as therein before directed in relation to the original letters of administration; and it would seem to follow that, in the absence of any next of kin, entitled under the statute, who are qualified for such appointment, the public administrator would be entitled, and that the power to designate some other person to receive such letters, must be confined to the particular case referred to in chapter 403, of the laws of 1863, which is limited to the will of a testator domiciled without this state, at the time of his death, and whose will shall be probated in this state, on exemplification of a foreign record thereof, or otherwise,—in which case the statute authorizes the grant of letters to executors, administrators, or other person, or persons, entitled to possession of the personal estate, or to any *person or persons* authorized by him or them to receive the same, that is, the executors, administrators, or other person or persons entitled to the possession of the personal estate in said county.

MATTER OF ESPIE.

In *The Public Administrator v. Watts & Leroy*, 1 Paige, 382, it was held that the next of kin of the decedent, whether alien or citizen, is entitled to his personal estate; but if the next of kin is not the heir, or is legally disqualified from administering, the public administrator is entitled; and unless this case falls within the act of 1863, above cited, I am of the opinion that a power of attorney executed by the alien legatees would confer no authority upon this court to appoint any other person than the public administrator, with the will annexed.

Order accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—FEBRUARY, 1877.

MATTER OF ESPIE.

In the matter of the Estate of JAMES ESPIE, deceased.

A Surrogate's decree having been adjudged void, by the Supreme Court, it is superfluous for the Surrogate to vacate it.

On an application to the Surrogate to sign the record of business left incomplete by his predecessor, it is proper to require proof by affidavit or otherwise, of the facts; and to recite in the record, the mode in which the record was completed.

The parties in interest should have opportunity to be heard on such application, unless their consent is produced.

THIS was an application, in the matter of the estate of James Espie, deceased, to vacate a decree filed 29th December, 1875, on a final accounting of the administrator.

The decree in question though filed and acted upon, seems not to have been signed by the late Surrogate Hutchings, but was signed by the present Surrogate, as

MATTER OF ESPIE.

a completion of the unfinished record of his predecessor.

CULVER & WRIGHT, *for the petitioner.*

BUTLER, STILLMAN & HUBBARD, *in opposition.*

THE SURROGATE.—The reason for this motion arose out of the fact that the subsequent signature of the present Surrogate was adjudged invalid, and the decree therefore a nullity, and being so, I am not able to appreciate the necessity, or propriety of vacating what seems to have been adjudged by a judge of the Supreme Court at Chambers, to be no decree; much less would it seem proper for me to pass a decree of final accounting, without the parties being before me, and the auditor's report being confirmed; for if the proceedings of the late Surrogate are void, I should not feel at liberty to predicate any action upon them, but must consider the propriety of the decree as an original question.

By section 11, of 2 *Statutes at Large*, 232, it is provided that upon the office of any Surrogate becoming vacant, his successor shall have power and authority to complete any business that may have been begun, or that was pending before such Surrogate.

By chapter 74, of the laws of 1870, section 2, it is provided that for greater certainty, and to avoid all doubt, it is lawful for any Surrogate in his own name, to sign, certify, and complete all unfinished records of wills, and of proofs, and examination taken by, and before his predecessor in office, adding to his signature the date of so doing. This latter section was amended by chapter 9 of the laws of 1874, adding authority thus to sign, certify, and complete records of the letters testamentary, administration and guardianship.

I think it is a serious question whether greater certainty, or the avoidance of all doubt is secured by the acts recited.

MATTER OF ESPIE.

The 11th section of the revised statutes above cited, was intended to give to a Surrogate power and authority to complete any business that may have been begun, or that was pending before his predecessor. Indeed, without that statute, as the *office continues*, though the term of the incumbent may expire, or he be removed by death, or otherwise—I am of the opinion that the authority of a successor, under his general powers, would extend to the completion of business pending when he entered upon his official duty; and the term "*becoming vacant*," in section 11, I think should be construed to mean, when one Surrogate goes out, and his successor becomes vested with the functions of his office. To hold otherwise, would be to involve an incoming Surrogate in great unnecessary labor, in a trial of contested matters which had been under his predecessor nearly concluded, and any record of a will, or otherwise, which should not have been completed by the signature of the Surrogate, would apparently have to be recorded anew, which would seem to be absurd. Hence, it appears to me, that the acts designed to avoid all doubt, have in effect increased that doubt, for they have limited the completion of a prior Surrogate's business, to the signing of specific records, and created what doubt exists, as to whether the successor may complete any other business left unfinished under the 11th section above cited.

I entertain no doubt, therefore, that any decree actually made by any of my predecessors which is incomplete by their failure to sign the same, may be made complete by the present Surrogate, without the necessity of taking up the matter *de novo*; the only question of doubt being, how that completion shall be made; and it seems to me that a Surrogate having that general power to complete the business of his predecessor, when he does so complete it, the presumption is that he has

MATTER OF ESPIE.

possessed himself fully of the facts, as to the business of his predecessor left thus incomplete.

But it seems to me that a precaution very proper to be observed by a successor, and which would render the proceedings intelligible, would be to require an affidavit, or other proof, to advise him of the facts and thereupon to complete the business from the point, where it was left unfinished, under an order of his Court, reciting the fact that he had been duly advised as to the action of his predecessor, and then the record thus completed, together with the order under which it should be so completed, would make the record both intelligible and conclusive.

Under the circumstances of this case, I cannot consent to enter a decree *de novo*, without the parties being heard, unless evidence is furnished to me of the confirmation of the auditor's reports, or the consent of the parties interested in the settlement of the account as rendered. Either of these facts being presented, I should then be enabled to enter a decree in conformity thereto.

Order accordingly.

WILLIAMSON v. WILLIAMSON.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—MARCH, 1877.

WILLIAMSON v. WILLIAMSON

In the matter of the Probate of the last Will and Testament of GEORGE W. WILLIAMSON, deceased.

The signatures of the attesting witnesses need not immediately follow that of the testator; but the attestation clause may intervene.

A will was proved by a full attestation clause, by proof of the handwriting of testator's signature, and that of two subscribing witnesses, deceased, and by the testimony of an attorney who was a third subscribing witness; and it appeared that the testator was also a lawyer, and the will was in his handwriting. *Held*, sufficient.

The provision of 2 R. S., 58, § 13, that the proponent of a will for probate, on proving it by the handwriting of the testator and deceased witnesses, should give proof of such other circumstances as would be sufficient to prove the will on a trial at law,—does not require further evidence than this. *See*

THIS was a proceeding for the probate of the last will and testament of George W. Williamson, deceased.

The will appeared to have been executed on the 24th day of July, 1866, in duplicate, one of the two originals being in the handwriting of the testator, he having been a lawyer. It was witnessed by Cornelius R. Sutton, Isaac Fryer, and George J. Greenfield.

The witnesses subscribed their names as such, only at the close of the attestation clause, and not at the foot of the will, at the left of the testator's signature.

The witnesses Sutton and Fryer, were shown to be dead, and their signatures were proved by Mr. Greenfield, one of the subscribing witnesses who saw them sign, and also by two other witnesses, George L. Kingsland, and Enoch Armitage, and the witness Kingsland, also testified to the genuine signature of the testator subscribed to the will.

WILLIAMSON v. WILLIAMSON.

The testimony of the witness Greenfield, an attorney, showed a full compliance with the statute, in respect to the execution of the will; that it was signed by the testator in the presence of all three of the witnesses; that the testator declared to them that it was his last will and testament, and requested them respectively, to subscribe their names as such, and they did so, in his presence, and in the presence of each other.

JOHN L. SUTHERLAND, *for the proponents.*

JOHN MCKEON, *for the contestants.*

THE SURROGATE.—The learned counsel for the contestant in this matter interposes two objections to the probate of the will in question.

1st. That the subscribing witnesses have not signed their names as such, at the end of the will, but at the end of the attestation clause, and he cites several authorities, among others, *Jackson v. Jackson* (39 N. Y., 159), to show that the attestation clause is no part of the will, and therefore that the witnesses should have signed their names opposite that of the testator, and if the attestation clause were added, the witnesses should have subscribed it also.

While the strict language of the statute gives color to this objection, yet it is a startling proposition, which would practically destroy almost any will executed since the enactment of that statute. In the case of *Jackson v. Jackson* (*supra*,) no such question arose, but the question there was, whether the will was duly proved, notwithstanding the attestation clause did not recite all the details of the execution, and the learned justice who gave the opinion of the court in that case, says: "As a memorandum of what occurred, and as a means of securing the attention of the witnesses to the fact that all required formalities have been observed, it is very de-

WILLIAMSON v. WILLIAMSON.

airable that it should be full and precise in details. Sometimes when the witnesses are dead, it may be of great importance as presumptive evidence of due execution."

In *McDonough v. Loughlin* (20 Barb. 238), which was a case where the attestation clause contained also a memorandum of erasures, and interlineations in the will, and the attesting witnesses subscribed at the end of this memorandum, the court say: "The legislature undoubtedly intended that the certificate of attestation should intervene between the body of the will, and the names signed by the witnesses. The memorandum of the erasures, and interlineations, is merely part of the certificate. Taken together, it states, that the paper as altered, was executed by the testator and attested by the witnesses. That so far as I know is, and was before the adoption of the Revised Statutes, the usual practice, where there are alterations to a will, as at first drawn, and it seems to me, is free from objection, and very proper. The alterations in the will are quite numerous; the memorandum is consequently a long one, but that, in the absence of any charge of fraud can make no difference."

In the *matter of Cohen* (1 Tucker, 286), it was held that the subscription by the testator, at the end of the attestation clause, was a compliance with the statute.

I think it will be found that all the precedents show that where there is an attestation clause, the signatures of the witnesses are subscribed to the attesting clause.

2d. The counsel for the contestant also objects to the probate on the proof, because under section 13, of 2 *Rev. Stat.*, 58, the proponent should give such other circumstances as would be sufficient to prove such will on a trial at law, in addition to the proof of the handwriting of the testator, and of the witnesses dead.

WILLIAMSON v. WILLIAMSON.

It is not easy to understand what is meant by the language of the section last cited: "such other circumstances as would be sufficient to prove such will on a trial at law;" for cases may be easily imagined where no others than the testator, and the subscribing witnesses, were present at the execution, and where nothing was ever said by the testator thereafter, in respect to his having made a will, and in such case, no additional circumstances would seem to be within reach of the proponent.

In *Butler v. Benson* (1 Barb., 538), the will had been published, if at all, about ten years before the hearing. One of the subscribing witnesses had nearly forgotten the whole transaction, and the other was almost as much lost, on many important points.

The court held, that where the witnesses are dead, or from lapse of time, do not remember the circumstances attending the attestation, the law, after diligent production of all evidence then existing, and if there are no circumstances of suspicion, presumes the instrument properly executed.

The facts proved in this case bring it clearly within the principle of *Orser v. Orser* (24 N. Y., 51), and *Cornwell v. Wooley* (45 How. Pr., 475.) In the first place it is quite clear that the proof furnished would be sufficient to prove the will in question on a trial at law, and in the second place, the circumstances additional to the ordinary proof of execution are very significant, and relieve the case from all substantial doubt in respect to the due execution of the will in question.

In addition to the formal proof made by the witness Greenfield, the fact that said Greenfield was an attorney and familiar with the requisites to such execution, and that the signatures of the testator, and of the deceased subscribing witnesses were proved by an impartial wit-

TALMADGE v. WILLIAMSON.

ness other than the subscribing witness, and the facts that the testator himself was a lawyer, and therefore presumed to understand how such an instrument must be executed to secure its validity, and that one of the duplicate wills was in his own handwriting, leaves no doubt in my mind that the will has been duly proved, and its probate should be decreed.

Decree accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE, MARCH 1877.

TALMADGE. v. WILLIAMSON.

In the matter of the Estate of JOHN WILLIAMSON, deceased.

As a general rule legacies vest immediately on the testator's death, and words making them payable at a later time, do not prevent immediately vesting, unless an intent to postpone vesting is clearly manifested.*

The will, after giving a life estate to the widow, added a direction that the executors divide the remainder, and all arrearages of income, etc., into parts, and pay and assign over one such part to each of certain legatees, the issue of any one dead, to take the portion the deceased parent would have taken. *Held*, that the gifts vested in interest at the testator's death.

The fact that the gifts to females among them, should be free from the control of husbands, etc., did not alter the construction in this respect.

This was a proceeding in the matter of the estate of John Williamson, deceased, for the final accounting of Richard Williamson, Jr. executor.

The question submitted for determination was, whether a legacy to the testator's niece, Isabella Tal-

* See *Lynch v. Maloney*, ante, 434.

TALMADGE. v. WILLIAMSON.

madge one of the children of his deceased sister, Isabella Montgomery, vested at the decease of the testator, or lapsed, she having died without issue before the death of testator's widow, who, by the will, was entitled to the income of the estate, during her life.

The will in question, among other things, provided that the trustees appointed should collect the residue of the testator's personal estate, and convert his real estate into money, and invest the same, and pay to his wife the residue of the net income, after payment of an annuity to the daughters of his deceased nephew, during her natural life; and on the death of his said wife, to pay out of the principal, \$10,000 to his nephew, and \$5,000 to such persons as his said wife should, by a last will and testament, limit and appoint, "and to divide all the rest and residue of the principal of the said estate, and all arrearages of interest, or income arising therefrom, into five equal parts, and to pay and assign over one equal part thereof, to each of the following named children of my deceased sister, Isabella Montgomery, viz., William J. Montgomery, John A. Montgomery, Isabella, wife of Henry Talmadge, and Margaret, wife of Anthony V. Winans, the lawful issue of such one of said children, as may then be dead, taking the portion of their deceased parents, share and share alike, and the other equal part thereof, to pay and assign over to the two daughters of my deceased nephew, John Williamson and the survivor of them, and the heirs of such survivors." In a subsequent clause, the testator stated that the bequests to females were to be taken for their separate, and sole use, and not to be subjected to the control or liability for the debts of their husbands.

VANDERPOEL, GREEN & CUMING, *for the executors.*

ROBERT BENNER, *for next of kin.*

TALMADGE v. WILLIAMSON.

THE SURROGATE.—Upon reading the peculiar language of the will in question, it occurred to me whether there was not a distinction to be recognized between those bequests which the will gives *in presenti*, to a legatee, subject to a life interest, and those cases where the gift seems to be *in futuro*, as in this case upon the death of the wife, the trustees being directed to pay and assign over, &c.

But upon a more careful examination and consideration of the case, it seems to me that in the language of the Surrogate in *Conklin v. Moore* (2 *Bradf.*, 179), this will substantially gave a life estate to the widow, with remainder in equal proportions to the children of his deceased sister, &c.

In the case last cited, the language of the will seems to have been substantially identical with that of the will under consideration. (See also *Marsh v. Wheeler*, 2 *Edw. Ch.*, 156; *Van Wyck v. Bloodgood*, 1 *Bradf.*, 172; *Hayes v. Gourley*, 1 *Hun*, 38.) Many more authorities might be cited, but sufficient have been mentioned to establish to my satisfaction, the fact that the legacy of Isabella Talmadge vested at the death of the testator, and therefore goes to her personal representatives.

It was urged on the argument of this matter, that the fact that the testator provided in a subsequent clause of his will, that the bequest to the females should not be for the benefit of their husbands, or liable for their debts, was an indication that he did not intend to vest the legacies until the death of his widow. But I am not able to appreciate the force of the argument, or concur with the idea that for the purposes of the legatees, and their children, the legacy should be regarded as vested, but for the purpose of preventing the husbands from participation in the testator's estate, the legacy was to be regarded as contingent.

RENHOLM v. THE PUBLIC ADMINISTRATOR.

Let a decree be submitted, distributing the estate as provided by the will, except as to one-fifth interest bequeathed to Elizabeth, deceased, and that share to be given to her personal representatives.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—MARCH, 1877.

RENHOLM v. THE PUBLIC ADMINISTRATOR

In the matter of the Estate of MARIA RENHOLM, otherwise MEYER, deceased.

For the purposes of establishing a right to administer, a marriage with the deceased may be proved by evidence of cohabitation, declarations, and repute.

Evidence of the declaration of the deceased that she was not married, is not necessarily inconsistent therewith, for it may have referred to ceremonial marriage.

Nor is evidence that the deceased woman had deposited money in her maiden name, where she had previously been married to another.

PETITION for letters of administration upon the estate of Maria Renholm, otherwise Meyer, deceased.

Andrew Renholm filed his petition setting forth that he was the husband of the deceased, who died intestate, in New York, the 19th December, 1876, and that she died possessed of certain personal property in that city, which did not exceed \$1,300, and that she left her surviving no next of kin.

The public administrator appeared and answered, denying that the petitioner was the husband of the intestate, and applied for letters of administration, on the ground that the intestate left no next of kin.

The matter was referred to Cornelius Minor, Esq., to take and report testimony as to the marriage of the

BENJAMIN C. THE PUBLIC ADMINISTRATOR.

petitioner with the deceased; and the referee filed his report with the testimony annexed. This report stated that, though by the order of reference he was not directed to determine the matter in controversy, or give his opinion upon the case, yet as the respective counsel summed up the case before him, he appends his opinion. The petitioner did not claim that he was ceremonially married to deceased, but that eight days after her former husband's death, he commenced to cohabit with her; and gave testimony that the deceased called him her husband, and he called her his wife. On behalf of the public administrator, testimony was given that the deceased declared, during her cohabitation with the petitioner, that she was not married, and would not marry again: that shortly before her death, she deposited money in the savings bank, in the name of Meyer, and that the petitioner, after her death, admitted that he was not married, and that she, at any time, could have left him, and he, her, and the other could have married without violation of the law. Though the testimony was conflicting, the referee was of the opinion that the weight of testimony was against any marriage by verbal agreement of the parties, or holding themselves out as husband and wife; and that it would be against sound morals to uphold the connection, as constituting a legal marriage, and that the petition should be dismissed, and letters granted to the public administrator.

MR. ROGERS, *for petitioner.*

L. H. ARNOLD, *for public administrator.*

THE SURREGATE.—An examination of the testimony in this case, but for the conclusion reached by the referee, who had the opportunity to see, and could best judge of the credibility of the witnesses, would leave

REINHOLM v. THE PUBLIC ADMINISTRATOR.

the matter in very serious doubt, whether or not there was a verbal agreement between the husband and the intestate, to live together as man and wife. The law is well settled in this state, that a marriage is complete, if there be a full, free, and mutual consent between parties capable of contracting, though not followed by cohabitation. (*Jackson v. Winne*, 7 Wend., 47.) A marriage may be inferred in ordinary cases, from cohabitation and acknowledgment, and no formal solemnization is requisite. (*Clayton v. Wardell*, 4 N. Y., 230; *O'Gara v. Eisenlohr*, 38 Id., 296; *Christie v. Clark*, 45 Barb., 529; *Rockwell v. Tunickiff*, 62 Id., 408; *Van Tuyl v. Van Tuyl*, 57 Id., 235.)

In this case, there is considerable evidence that the parties cohabited together as man and wife, calling each other such, and that they spoke to others of themselves as such; and while there is no evidence of an actual agreement to live together as man and wife, yet their conduct was sufficient to imply and establish that relation. The only question to be considered is whether that presumption is overcome by the testimony adduced by the public administrator. This testimony seems to be confined to a statement of the deceased, that she was never married, which doubtless referred to a formal ceremonial of marriage, and might be entirely consistent with an agreement to live as man and wife. The only reliable evidence that she did not regard their relation, or any agreement between them, as creating the marriage relation, is to be found in the use of her maiden name, for the purpose of depositing money in the savings bank; and yet, even that was obviously untrue, from the evidence given, for she was a widow, and legitimately bore the name of her first husband, if it had not been changed by the relation between the petitioner and herself.

RENHOLM v. THE PUBLIC ADMINISTRATOR.

The case of *Van Tuyl v. Van Tuyl*, above cited, was an action for partition, and the defendant claimed to be the widow of the deceased, Taylor, and entitled to dower, and that her children were entitled as heirs at law; and the proof showed that there was no solemnization of marriage between them; that the alleged wife consented, under persuasion, to receive the deceased as her husband; and they secretly cohabited together; and that she afterwards left his house, and went to live elsewhere, in a house furnished by Mr. Taylor, where she resided under an assumed name; that she had introduced Mr. Taylor as her husband, and he recognized her as his wife; and that she assumed the name for the purpose of keeping their relation from his family. These facts were held to constitute a marriage.

Suppose that the result of the cohabitation between petitioner and the intestate, had resulted in the birth of children; could it be claimed that they, under the circumstances of this case, would be adjudged illegitimate? Or suppose the petitioner, having ample means, after cohabiting with the deceased for a series of years, as man and wife, had abandoned the deceased; would there be any reasonable doubt that he might be made responsible for her support?

I think it a very serious question whether good morals would be better promoted by sanctioning the cohabitation of the parties in question, and attaching to it the liabilities of the marital relations, than by holding that such cohabitation was meretricious, and creating no marital obligation.

The petitioner, as the wife of the decedent, is entitled to letters of administration upon the estate.

Decree accordingly.

ORDISH v. McDERMOTT.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—JANUARY, 1877.

ORDISH v. McDERMOTT.

*In the matter of the Probate of the last Will and Testament
of EDWARD McDERMOTT, deceased.*

Under 2 R. S., 64, § 42, there can be no implied revocation of a will, by means other than such as are defined in the statute.

A will made in ignorance of the existence of a living child, is not revoked even at common law, by the discovery of its existence.

THIS was a proceeding for the probate of the last will and testament of Edward McDermott, deceased.

The will bore date the 4th day of May, 1859. By it the testator devised and bequeathed all his property, after payment of his debts, to his wife, Rose Ann McDermott, and appointed her his sole executrix.

The objections to the petition were filed by Joseph G. Ordish, an alleged son of the deceased, by an alleged former wife; and were to the effect that the will was not duly executed — that the deceased was not of sound mind when it was executed, and that it was procured by undue influence exercised upon him by his wife.

Much testimony was given in behalf of the contest, and tending to show that many years ago, the testator was married to a wife, by whom he had a son, and that soon thereafter, by reason of the testator's intemperate habits, and neglect of business, his wife separated from him, she taking the child; and that the contestant was a son born of that first marriage.

There was considerable testimony to show that the testator and his alleged wife were never married; that she was a person of immoral and low character; that the child in question, the contestant, was born in 1841; that

ORDISH v. McDERMOTT.

the alleged former wife, with the son, removed to Connecticut; and there seemed to have been no further intercourse between the testator and his alleged wife thereafter; some evidence also was given, that he supposed that she and her son were deceased.

In September, 1849, the testator married the widow, the legatee and executrix, Rose Ann, with whom he cohabited until his death. Some testimony was given for the purpose of showing that their married life was not entirely harmonious; that several of her relatives, from time to time, were inmates of the family, and that he complained of the expenses of their support, and also of his wife's interference with his moneys, bank books, &c., but the testimony on the part of the proponent substantially contradicted this testimony, and showed that they lived happily and peacefully together; that their relations were of the most affectionate character, and that his wife was instrumental in substantially reforming his intemperate habits.

Due execution of the will was proved; and the circumstances connected with the execution of his will seemed to have been in no way peculiar.

It appeared, however, that the contestant, after wandering about the country considerably, made his appearance, and claimed to be a son of the testator, by his first wife, who afterwards married one Ordish, in New Jersey; that his mother died in 1860, in San Francisco. His visit to the testator in the city of New York seems to have been in 1872. There seems to have been no substantial recognition of the contestant, by the testator, at that time, and his testimony, and that of the widow, differed very materially, in respect to what occurred at the time of the interview; but the circumstances connected therewith do not materially affect the question of the probate of this instrument, except so far as it disclosed to the testator the existence of his alleged son.

ORDISH v. McDERMOTT.

The only evidence which was given upon the question of identity of the contestant, with the son of the alleged first wife of the testator, was given by contestant,—that he was a son of Delia E. Kelly, who subsequently married one Ordish, but whether she was the Delia Kelly who married the testator in 1837, according to the certificate of marriage, did not clearly appear.

J. S. STEARNS, *for proponent.*

W. W. CULVER and SAMUEL JONES, *for contestant.*

THE SURROGATE. — I think there are very serious doubts upon the evidence, whether the contestant is a son of the testator. The contestant substantially abandons the objection filed to the probate of the will, and claims that the discovery that testator's son was living, constitutes a revocation of the will, and this is the only question of law, which it seems to me needful to discuss.

The testator died on the 26th day of March, 1875, and it is claimed by the contestant, that in 1872, the proponent was called upon by the contestant, who claimed to be his son, by his former wife, and yet no change in his will was made on that account.

The statute (2 *Rev. Stat.*, 64, § 43) provides that if after the making of a will, disposing of the whole estate of the testator, he shall marry, and have issue of such marriage, born either in his life-time, or after his death, and the wife or issue of such marriage shall be living at the death of the testator, the will shall be deemed revoked, unless provision shall be made for such issue by settlement, or in the will, so as to show an intention not to make such provision.

By section 42, it is provided that no will shall be revoked, or altered, otherwise than by the acts referred to therein, and no mention is made of the discovery of an

ORDISH v. M'DERMOTT.

heir, either forgotten or unknown by the testator, at the time of the execution of the will, and I am of the opinion that when the statute undertook to define what should constitute a revocation, all other causes must be excluded.

In *Langdon v. Astor* (16 N. Y., 9), Chief Justice DENIO, after citing the statute referred to, says: "The argument and the opinion which I have before mentioned is, that satisfaction of a legacy by an advancement made by the testator in his life-time, is an implied revocation; that the statute in its general language embraces all manner of revocations, and that the words, 'except in the cases hereinafter mentioned,' followed as they are by special instances in which particularly implied revocations are allowed, render it quite clear that no other description of revocation either express or implied can now occur. The argument appears to be unanswerable if ademption or satisfaction is the same thing as implied revocation."

In *De lafield v. Parish* (25 N. Y., 9), Chief Justice SELDEN says: "Without examining the question whether the circumstances relied upon by counsel would amount to an implied revocation at common law, it seems to me that the statute presents an insurmountable obstacle to the establishment of such a revocation here." And he quotes the statute and the Revisors in their notes, "that it is believed that the provisions contained in the sections referred to, dispose of the whole doctrine of implied revocations."

But if this were not so, it is equally clear that the circumstances disclosed in this case would not constitute a revocation at common law.

In *White v. Barford* (4 Maule & Selwyn, 10) it was held that the testator having married, and afterwards made his will, and devised to his niece, and afterwards dying

ORDISH v. M'DERMOTT.

leaving his wife *enciente* with a daughter which was unknown to him, the birth of the daughter was not a revocation of the will. In that case, LORD ELLENBOROUGH states the rule to be, that marriage and having children, where both circumstances concur, has been deemed a presumptive revocation, but it has not been shown that either of them singly is sufficient, and he instances a case of a sailor who made his will in favor of a woman with whom he cohabited, and afterwards went to the West Indies, and married a woman of considerable substance; it was held, notwithstanding the will swept away from the widow every shilling of the property, the birth of a child must necessarily concur, in order to constitute an implied revocation.

In *Sheperd v. Sheperd* (5 *Term Reports*, 51), in note, substantially the same doctrine is maintained. See also *Brush v. Wilkins*, 4 *Johns. Ch.*, 506, and cases therein cited, and discussed.

I am of the opinion that the discovery of the existence of the alleged son, if he be such, did not revoke the will.

That the will has been duly proved, and the same should be admitted to probate.

Order accordingly.

MARSH v. GILBERT.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—FEBRUARY, 1877.

MARSH v. GILBERT.

In the matter of the Estate of JAMES MARSH, deceased.

An executor who, at the time of the making of the will, resided within the jurisdiction, and removes therefrom after undertaking the duties of the office, is not entitled to charge, in his accounts, his traveling expenses in visiting the place of jurisdiction on the business of the estate.

It seems that an advancement made in stocks, and charged on the testator's books at an estimated value, may be regarded as no advancement, if the stocks be proved to have been valueless at the time the charge was made.

But to avoid the effect of an advancement, on such a ground, the evidence should be clear.

Section 309 of the Code of Procedure, excluding the testimony of a party, &c., to a personal transaction or communication between him and a person deceased, in certain cases, does not preclude a party from testifying that he overheard a conversation with the deceased, in which the witness did not participate.*

An objection to the exclusion of a question on the examination of an executor or administrator, on his accounting, should not be sustained, if the materiality of the question does not appear, by connection with the point in issue.

THIS was a proceeding for the final settlement of accounts of the executor of the will, &c., of James Marsh, deceased.

The executors, Clinton Gilbert and James Marsh, Jr., filed an account of their proceedings, July 7th, 1874. Objections being filed, the account, with such objections, was referred to an auditor who filed his report December 27th, 1876, to which exceptions were filed January 8, 1877, by James Marsh, Jr., one of the executors.

During the pendency of the reference, Marsh, one of the executors, filed a supplemental account. The au-

* On this subject, see *Brague v. Lord*, 2 Abb. New Cas., 1.

MARSH v. GILBERT.

ditor among other things disallowed a charge made by said executor in his supplemental account, for expenses to and from Philadelphia, and also disallowed a claim made by him for \$12,500, with interest from the death of the testator, \$3,864.58, amounting in all to \$16,364.58.

To this finding Marsh filed exceptions, stating various forms of objection to the conclusions of fact in reference to the disallowance last above stated, and also to the general result reached, by which the auditor had found that there remained in the hands of Marsh, \$1,312.68, subject to the payment of the balance of the executor's commissions, &c. The charge for expenses appeared to have been made by the executor, James Marsh, Jr., for traveling expenses &c., in coming from Philadelphia where he resided, to the city of New York, for the purpose of filing, and settling his account as executor.

The testimony showed that when he was appointed, and claimed to undertake the duties of his office, he resided in the city of New York, but subsequently thereto removed to Philadelphia, where he continued to reside, and engaged in business.

The testimony taken before the auditor which was very voluminous, principally related to the disallowance of the \$12,500, with interest.

It appeared that the testator made his last will and testament dated November 27th, 1869, and died the 25th day of October, 1872, leaving three children, Walter R. Marsh, Mrs. Josephine M. Brown, and James Marsh, Jr., the executor, legatees.

His will among other things, provided in the fourth clause, that after the decease of the testator's wife, his children should share his property equally, but until the final distribution, no one of them should receive

MARSH v. GILBERT.

more than \$10,000; and it stated in the fifth clause, that the payments that had been made to his children, out of his estate, were, to Walter \$10,000, in cash and to Josephine \$5,000 in bonds, and that Josephine was to receive her board, and lodging free of charge while she remained unmarried as an equivalent for the large sum paid Walter, but should she marry, or leave him then she was to have the further sum of \$5,000. The sixth clause provided that James should receive the interest on \$5,000, and board and lodging, free of charge, and when he wished, he should receive \$10,000 in cash, at which time the interest on \$5,000 and the free board and lodging should cease.

It appeared on the books of the testator that he kept accounts with his children, which were adjusted January 1, 1871, when he charged to Walter R. \$12,500, Mrs. Josephine M. Brown \$10,000, and to James Marsh, Jr., \$12,500.

As to this latter charge the controversy arose; he, James, claiming that he never received the amount; that it was charged to him for stock of the American Fertilizing Company, (par value \$20,000) at 62½ cents, which as was claimed by him turned out to have been worthless, when it was delivered to him, and therefore he claimed, that he was entitled to his proportion of the estate, without regard to such charge and that he was not chargeable with that sum, as an advancement.

On the hearing, the executor Marsh testified that he came into possession of some of the books of the testator soon after his decease, that the said company became bankrupt six months before his father's death, that he was treasurer of that company but held his other office in it—that he held the receipt of Walter R. Marsh for his \$12,500 given to deceased before his death; also

MARSH v. GILBERT.

receipts by Josephine M. Brown for \$10,000; that in his first account filed July 7, 1874, there was no claim inserted by him against the estate; that he never filed any claim against the estate, that he resigned as treasurer of the company in August, 1872; that there was no formal dissolution of the company; the officers resigned, and the directors ceased to meet;—that the company had a factory, machinery, and patents; that the principal factory was sold to the American Chemical Works Company, and he purchased the little factory, and its tools and patents were sold to the last named company—that his father gave him \$20,000 of the stock of the Fertilizing Company in January, 1871.

The charge in testator's books was "January 6th, 1871, James Marsh, Jr. debtor. Cash paid him on account his interest in my estate, \$12,500." The witness further testified that his father gave him the stock in question on the 7th January, 1871; that he paid his father board from August, 1870, but stopped paying board from the middle of the year, 1872, because the Fertilizing Company had stopped, and failed; that he received no money from his father whatever, and that the entry in the book was an error; that testator's journal under date January 1871, charged witness with 800 shares at 62½ cents, \$12,500.

Clinton Gilbert, one of the executors, testified that he was present at the opening of testator's will, in the presence of Mr. Marsh, the other executor; Mrs Marsh the mother, Mrs. Brown and Mr. Brown read the will;—remarks were made by different persons present, as to what each had had, and it resulted in the acknowledgment on the part of young Mr. Marsh, that he had received \$10,000 and \$2,500, and his sister was to receive \$5,000. Dissatisfaction was expressed at the amount Marsh, the executor, had received, and he then proposed to pay

MARSH v. GILBERT.

each \$2,500. He further testified that he never heard of Mr. Marsh's \$12,500 claim, until he heard it in the Surrogate's office at the time of the accounting; his recollection being that Mr. Marsh said that his brother Walter, who was then deceased, had received \$10,000, that he, James Marsh, had received \$10,000 at one time, \$2,500 at another time, that he had had that amount from his father; that there was nothing said on that occasion about the Chicago property; that that executor, James Marsh, did not say to him soon after the reading of the will, that he could not get a good title to the Chicago land because of the child; that he did not think he had had any advancement; that he expected to have been made good by the purchase of the Chicago property.

Edward J. Brown, the husband of one of the legatees, called for contestants, testified that in a conversation with Mr. Marsh, he told him that in 1870, the Fertilizing Company was a good thing, and that he was going into it, going to put in \$10,000; had heard him say that he owned \$20,000 of the stock; that he acquired it January 6th, 1871. Walter Marsh died June 24th, 1872. Witness was present at the testator's house, soon after the funeral, when the will was read. James Marsh on that occasion said that Walter had had \$10,000, \$2,500 more than Mrs. Brown; that he had had \$10,000, and \$2,500 out of his share of the estate; and as the will called for but \$10,000 for him, he would pay back \$2,500 at once, and asked Mrs. Walter Marsh to do the same thing; and she said it would be inconvenient to do so. Witness then suggested that his wife should be paid \$2,500, which would equalize all three, and nothing would be necessary to be paid back. He made no claim at that time, that he was entitled to an allowance because of his connection with the American Fertilizing Company.

MARSH v. GILBRET.

Mary S. Marsh, the widow of Walter R. Marsh, a witness called for the contestants, testified: that she was present at the reading of the will in question, when James Marsh said that he and Walter had both received \$12,500 from their father; that he had the receipts in an envelope in his hands, which contained what he had received, and said he was willing to pay back \$2,500 to the estate; that W. Brown suggested that his wife should receive \$2,500 instead, making it even—that she had no remembrance of James Marsh speaking of the Chicago property at that time.

Josephine M. Brown, a witness called for the contestants, testified: that she was present at the reading of the will; remembered a conversation about \$2,500 which she had not received; that the executor Marsh proposed paying back \$2,500; that Mrs. Walter Marsh should pay back the same; that her husband proposed that she should receive \$2,500 more, which Mr. Marsh objected to; that he preferred to pay back his \$2,500.

George P. Avery, Esq., counsel for the executor Marsh, was called, and testified that: he was present at the house of the testator soon after his death, when the conversation took place in respect to the advancement made by the deceased. James Marsh then said that he would give Josephine \$2,500, if Mrs. Walter Marsh would give her the same amount. Mrs. Marsh said she could not do so, that she didn't see why she should give her \$2,500, or how she was going to do it. James then said they had \$1,600 of her money in hand, and would let her have the rest. Witness told James on that occasion that he could not get a good title to the Chicago property. Witness went to see Mr. Gilbert, with Mr. Marsh, a short time before the accounting, and had a conversation. James's stock

MARSH v. MAHONEY.

was valueless, but the matter was charged in the book; he thought that the whole subject should come before the Surrogate—that he was clearly entitled to something more than the others.

James Marsh was recalled on his own behalf, and testified that on the occasion of reading the will he did not make any offer to pay any money. He said his brother had received \$12,500 cash; his sister \$5,000 in mortgage, and he had received some Fertilizing Company stock, which was not good; and that his father had sold him his interest in the Chicago property for about half what it was worth;—that he expected to have got it, when Mr. Avery told him he could not get a title;—that then he offered if he could get the property, to equalize the three payments by paying back enough into the estate, if his sister-in-law would do the same, and suggested that she had \$1,600 in his father's estate, the proceeds of her husband's life policy; that the will provided that each should have \$10,000, that his brother had received \$2,500 more, and when Mr. Avery told him he could not get title to the Chicago property, he said he would think about it, and consult with Mr. Gilbert. That if he got the Chicago property he was to pay back \$2,500, because he knew he had got a deal of money by that purchase, but that it was a voluntary proposition on his part. Edward J. Brown, recalled for contestants, testified that at the interview spoken of, Mr. Marsh did not say that he had received the Fertilizing Company's stock, that it was not good, that his father had sold him his interest in the Chicago property, for about half its worth, nor did he offer to equalize the payments of the children, if he got the property by paying back. Mary S. Marsh, recalled for contestants, testified, that she did not remember anything of that kind, or any condition of

MARSH v. GILBERT.

his getting the Chicago property, for the offer made by him to refund.

Josephine M. Brown, recalled for the contestants, corroborated Mrs. Marsh, in respect to the same alleged conversation.

Edward J. Brown, recalled, testified that James Marsh, Jun., told him, before the death of his father, that he had bought the Chicago property, and that he could not get a title.

Edward J. Underhill was called on behalf of the contestants to prove the testimony given by James Marsh Jun., on a former accounting, which in several material respects tended to contradict his testimony on this examination.

Samuel A. Mitchell, called on behalf of the contestants, testified in respect to the Fertilizing Company, that it owned property of esteemed value and that he supposed it to be in a prosperous condition long after Mr. Marsh's connection with the company.

In the course of the examination the following questions were propounded to Mr. Marsh, by his counsel.

Q. In the trips with your father to Chicago, were you present at Mr. Meade's office during a conversation between your father and Mr. Meade, in which you did not participate, relating to the subject of the transfer of this property to you, by way of advancement? Did your father know you were present at the time of the conversation?

This was objected to, as incompetent, under section 399 of the Code. The objection was sustained, and the executor's counsel excepted.

GEORGE P. AVERY, *for the executor.*

GEORGE E. HOWE, *in opposition.*

THE SURROGATE.—[After stating the facts and the substance of the testimony as above],—I am clearly of

MARSH V. GILBERT.

the opinion that there is evidence sufficient to sustain the findings of fact of the auditor, and such as forbids my interfering with his conclusions, especially as the auditor had the witnesses before him, and could best judge of their credibility. I must therefore assume, for the purpose of disposing of the question of confirmation of the report, that the facts are correctly found by the auditor, and hence the only questions to be considered are those of law, growing out of and dependent upon the questions of fact thus found.

As to the disallowance of the executor's expenses in coming from Philadelphia to attend the accounting, I am of the opinion that the auditor was correct in his conclusions. The executor, when appointed, resided in the city of New York, and it may be presumed that the testator took into account that fact, as enabling the executor to give the necessary attention to the estate, without any extraordinary expenses.

It is urged by counsel for the executor that the appointment did not involve the necessity of the executor's continuing to reside in the same place, without regard to the exigencies of his business, and personal interests, which is doubtless true; and when he removed from the jurisdiction of the court, he was at liberty to do so, but not at the expense of the estate; and if the principle contended for by the executor be sustained, then the removal of an executor to California, or Europe, might involve, to an ordinary estate, ruinous expenses in returning to settle up the estate, and when carried to such an extent, the absurdity of the pretended principle, is made entirely apparent.

The question as to the advance charged by the testator, of \$12,500, against the executor, James Marsh, Jun., is one of more embarrassment because of the contradictory character of the testimony.

MARSH v. GILBERT.

If the testimony warranted the conclusion that the stock of the Fertilizing Company, at the time when it was delivered to said executor by the testator, and charged to him, was valueless, I should not hesitate to say, that the charge by way of advancement was without consideration, and void ; but the testimony offered by the executor is not satisfactory upon the subject of the alleged worthlessness of the stock in question. It does not appear that on discovering that it was worthless, he offered to return it to the testator, or made any claim against him in respect to it, but on the contrary, he seems to have put it into another company ; besides, the proof abundantly sustains the auditor, when he finds in substance that after his father's death the executor named, admitted the receipt of \$12,500, by way of advancement by his father, charged to him upon his books, and that he was willing to return \$2,500 thereof, in order to equalize his advance with the advance made to his sister. It is true that the executor claims that if that offer was made, it was upon the expectation that he would be able to perfect the title to certain property at Chicago, which he had verbally purchased of his father, at about half of its real value ; but upon this question he is substantially contradicted by several witnesses, and the auditor having the witnesses before him, hearing their testimony and observing their manner, is the best judge of their credibility ; and his finding in that respect ought not to be disturbed on a motion to confirm the report.

There are several exceptions taken to the ruling of the auditor, none of which need special consideration, except the one above stated, involving the competency of the executor to testify, in respect to an alleged interview between the testator and one Mead, in the presence and hearing of the witness, James Marsh, Jr., in Mr. Mead's office at Chicago.

MARSH v. GILBERT.

It is quite probable that the auditor in his exclusion of this question, may have regarded it excluded by the 399th section of the Code, which provides that no party to an action, or proceeding, nor any person interested in the event thereof, shall be examined as a witness in regard to any personal transaction, or communication between such witness and a person at the time of such examination, deceased.

There are abundant authorities justifying the exclusion of any personal communication or transaction, between the witness Marsh and the deceased. In *Ross v. Ross* (6 Hun, 182), it was held that in an action by a physician, to recover for services to the testator, the plaintiff could not testify whether he treated the testator professionally, or not, on the ground that such testimony would tend to prove a promise on the part of the testator to pay for such services, and the law would thereby imply the obligation to pay.

In *Howell v. Van Sicklen* (*Id.*, 115), it was held that in an action on a note made by the testator, where payment was pleaded, the plaintiff could not give evidence of its non-payment.

In *Le Clare v. Stewart* (8 *Id.*, 127), it was held, that the next of kin interested in the event of an action, though not a party, could not testify to a conversation with defendant's intestate whether favorable to, or against his interest.

In *Dyer v. Dyer* (48 Barb., 190), it is held that in proceedings for the sale of real estate by the administrator to pay debts,—the claim of the respondent being disputed by the administrator, and tried by the Surrogate, after the witness had testified as to a conversation between the intestate and claimant, establishing the transaction,—the claimant could not be examined to prove that no such conversation had occurred, and

MARSH V. GILBERT.

that no such transaction had taken place. In that case Justice MILLER said that proof that no such transaction occurred, was not an examination in respect to such transaction, and that it was not a satisfactory answer to the objection urged to the testimony.

Again on page 193, he says: "It would be, I think, an evasion of the spirit and scope of this provision of the Code, to hold that proof contradicting the evidence introduced had no relation to the transaction, which had been established by the witnesses introduced by the administrator, because it proved that no such transaction had ever taken place."

Numerous other authorities might be cited, establishing the same principle; but such testimony should not be excluded, unless brought substantially within the provisions of the section; and the question in this case, in my opinion, did not come within its provisions, and did not call either for the personal transaction, or communication between witness and the testator, but for an interview between the testator and a third party heard by witness.

In *Simmons v. Sisson* (26 N. Y., 264), it was held that the section in question did not prohibit a party sued by the administrator, from testifying to a conversation heard by him, between the deceased and a third person;—that such hearing was not such a transaction between deceased, and the witness.

In *Loddell v. Loddell* (36 N. Y., 327), Justice PARKER says: "The transactions or communications respecting which the witness sought to testify, were not between himself and the deceased person, or, in the explicit language of the statute, had personally by said party with the deceased person, but between the deceased and a third person. I am not able to see why he was not a competent witness to that transaction, or how with-

MARSH J. GILBERT.

out extending the limitation further than the statute has done, he should be excluded."

I entertain no doubt, therefore, that so far as section 399 of the Code was concerned, the question propounded and excluded was competent.

But I am equally clear that the question was properly excluded as immaterial. The question at issue was, whether the witness was chargeable with the sum of \$12,500, charged to him as an advance upon the books of the deceased, which he alleged was for stock that proved worthless, and that for that reason, he should not be charged with the amount. He also claimed that his expectation was, that he should be able to perfect his title to the Chicago property under a verbal agreement with his father, which induced him to offer to pay back \$2,500, so as to reduce the advance to the amount charged to his sisters; but the question propounded makes no allusion to the worthless stock, or the charge by way of advancement, but asks as to a conversation between Mead and the testator, relating to the subject of the transfer of the Chicago property to the witness, by way of advancement, and if the question had been answered, I am not able to perceive how it could have affected the question of the witness' liability for the advance charged in the books, and under the authorities above cited, it was immaterial whether the witness' father knew the witness was present, or not.

I am of the opinion that the question was properly excluded, and the counsel for the executor failed to show its materiality to the auditor.

The report should be confirmed.

Order accordingly.

SAVAGE v. OLMSTEAD.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—FEBRUARY,
1877.

SAVAGE vs. OLMSTEAD.

In the matter of the Estate of NOAH F. PIKE, deceased.

Omission to appeal from a Surrogate's order does not preclude the party from objecting, on the ground of want of jurisdiction, to its enforcement by the Surrogate's successor.

The Surrogate should not enforce an order made by his predecessor on a subject of which he had not jurisdiction, even though it was for a time acquiesced in by the party.

The court will not require the proceeds of a trust fund to be paid to the parent of minor beneficiaries, for their support, without requiring security from him as a guardian, even where he is unable to give such security.

The Surrogate's court has no general jurisdiction over testamentary trustees, other than that expressly conferred, or necessarily implied, by statute.

It has no power to control their conduct as such, except so far as their accounting, giving security, their removal, and the appointment of successors is concerned.

THIS was a proceeding in the matter of the estate of Noah F. Pike, deceased.

In 1874, the then Surrogate made an order on the petition of Joseph W. Savage, the father of the infant legatees, under the will of the deceased that the executors and trustees pay the income of the shares of said infants to their father, in reimbursement of funds expended by him in their support and education, prior to the receipt of the fund by the trustees, and authorized and directed them to pay such income, during the infant's minority, respectively, as it should be realized, by semi-annual payments, to the father, in repayment and reimbursement of the amount so previously expended for them in their support and education, upon his furnishing,

SAVAGE v. OLMSTEAD.

proof by the affidavit of some reputable person, showing that they had been maintained and educated for the period for which payment should be claimed.

The petition of the father, now presented, showed that the will was admitted to probate in 1872, that the order of the Surrogate was made after hearing counsel for the executors and trustees opposed thereto, and that they, in pursuance of said order, paid the petitioner. It was also averred that the petitioner was in failing health, and for four years past had been compelled to give up business; that his means were limited, and inadequate to the support of the children; that he was advised that this court had full power over the estate of the infants, and the mode of its application, and that the order was reasonable; that the order was not appealed from; and was therefore obligatory; that he had been informed by the trustees, that in future, they would decline to pay under the order, unless he procured himself to be appointed guardian; and they had given him formal notice to that effect. That he would be unable to furnish the necessary security to take out letters of guardianship in this State, and if the income should be withheld, he would be entirely unable to support the children. He accordingly prayed that an order be granted directing the trustees to comply with said order, and pay such income to him thereunder.

TRACY, OLMSTEAD & TRACY, *for the executors.*

W. HOWARD WAIT, *for the petitioner.*

THE SURROGATE.—By his will the testator directed the rest and residue of his estate to be divided into three parts; one part was given to the children in question, each share to be held by his executors *as trustees*; and by a recent decree on final accounting of

SAVAGE v. OLMSTEAD.

the executors and trustees, it was adjudged that the estate in their hands be held by them *as trustees*.*

It seems to me, therefore, that the question is distinctly raised as to the jurisdiction of this court over the conduct of testamentary trustees, who are trustees of an express trust; but the question arises in respect to my duty to enforce the order made by my predecessor; and though I do not consider it my duty to sit in review of an order or determination of my predecessor, yet I think it clearly my duty, if in my opinion he had no jurisdiction to make the order, although no appeal was taken therefrom, to refuse to enforce it; and I entertain serious doubts whether I should have jurisdiction in such a case to punish for its disobedience; and as the case presents a grave question of jurisdiction, I think it demands a very patient and thorough investigation, so that the jurisdiction in such a case may be reasonably well defined.

It is a dangerous practice to allow trustees to pay over to irresponsible persons trust funds, or the proceeds thereof, belonging to infants, who do not stand in any official relation to such infants, and have given no security for the right disposition of the funds; and it is no answer that in this case the recipient is the father of the infant, for experience has shown that the property of infants is not always safe in the hands of their natural guardians, and it seems to me that a wise precaution demands that the trustees should disburse the funds for the benefit of their *cestuis-que-trustents* who are infants, or require that they should be represented by the legal guardian who had given proper security for the honest and faithful performance of his duty as such.

In the first place, it is self-evident, and generally

SAVAGE v. OLMSTEAD.

recognized, that the conduct of trustees is peculiarly within the control and direction of the Supreme Court, vested, as it is, with the powers exercised by courts of chancery; and the question is, has the Surrogate under those statutes conferring certain jurisdiction over testamentary trustees, authority to make the order asked for in this proceeding. The counsel for petitioners cites the case of *Dubios v. Sands* (43 Barb., 412), as authority for the making of this order, but the authority exercised in that case was upon an executor as such; and in that case, the decision was put upon the language of 2 *Revised Statutes*, 220, section 1, subdivisions 3, 4 and 6.

The court held that there was ample authority to compel the appellants to perform their duty by expending for the benefit of the testator's eight children, the interest of the funds which had been entrusted in their hands for that purpose, and to compel them to execute the provisions of the will.

In *Corwin v. Merritt* (3 Barb., 341), it was held that the Surrogate's Court is a creature of the statute, and of inferior and limited jurisdiction; that those claiming under its decree must show affirmatively that the Surrogate had authority to make it, and that the facts upon which he acted gave him jurisdiction, and that it is a familiar principle that every statute authority in derogation of common law, must be strictly proved.

In *Seaman v. Duryea* (11 N. Y., 324), the statute above cited is very fully considered by Justice ALLEN, in determining the question of the authority of the Surrogate, under that statute, over the conduct of a guardian. And in *Wood v. Brown* (34 N. Y., 337), the same statute was under consideration in reference to the authority of the surrogate over the executors, and Justice MORGAN said: "But the difficulty still exists,

SAVAGE v. OLMSTEAD.

that a mere executor is not properly to be considered a trustee within the meaning of the statute, or within the meaning of the rule of a Court of Equity, conferring authority upon that court to interfere with the execution of his trust, by removing him, and appointing others to take his place."

In *Cleveland v. Whiton* (31 Barb., 544), it was said that Surrogates' Courts are courts of peculiar and special jurisdiction, and can only exercise the jurisdiction and powers conferred upon them by the statute. And if the statutes regulating their jurisdiction, and prescribing their powers, when favorably construed, fail to confer the authority claimed, it does not exist. Referring to various sections of the statute, as to the authority of the Surrogate to mortgage, lease, or sell real estate, the court said that the claim that these enactments conferred jurisdiction upon him to make such order, and to ascertain that the judgment creditor owes the devisees of the real estate a certain amount of rent, and apply the same upon the judgment, was not tenable, and that the statutes did not authorize the Surrogate to adjust the equitable rights which were claimed to exist between the devisees of the real estate, and the creditors of the deceased: and that there was no statute that could be construed to confer such authority upon him. In the case of *Dubois v. Sands*, above cited, *Willard on Executors* is quoted with approbation, as follows: "The foregoing specification of powers does not comprise the jurisdiction over express trusts, but leaves them to be executed as formerly, by a court having jurisdiction in equity. In one sense, every executor is a trustee for legatees, and next of kin. Over ordinary cases of such trusts, jurisdiction is conferred by the foregoing statute, but there are other trusts not provided for."

SAVAGE v. OLMSTEAD.

In *Shumway v. Cooper* (16 Barb., 556.) it was held that the Surrogate had no authority to inquire into, or settle the rights of heirs at law to property in the hands of the executor or administrator; that the powers and duties of the Surrogate were prescribed by law, and did not include the power to adjudicate between the heirs and the personal representatives, and these authorities are based upon the construction of the statute above referred to as to the authority of Surrogates over executors and administrators, the sixth sub-division of which is as follows: "To administer justice in all matters relating to affairs of deceased persons, according to the provisions of the statutes of this state;" and after enumerating various powers, the section closes as follows: "which powers shall be exercised in the cases, and in the manner prescribed by the statutes of this state," and in a subsequent case cited, this latter clause of the section is regarded as limiting the general language of the section, and it is worthy of special remark that the authority conferred upon the Surrogate over executors and administrators, embraces the power to direct and control their conduct, as well as settle their accounts. By the sixth sub-division, the authority to administer justice in all matters relating to the affairs of deceased persons is qualified in the latter portion of the subdivision, as follows: "according to the provisions of the statutes of this state." And the seventh subdivision conferring power upon the surrogate to appoint guardians for minors, to remove them, to direct and control their conduct, and to settle their accounts, is also qualified by the expression, "as prescribed by law." It is quite clear that these general powers do not embrace jurisdiction over testamentary trustees, and that the particular acts relating to that subject must be resorted to, to ascertain the extent of the jurisdiction conferred upon this court, over the conduct of such trustee.

4 |

SAVAGE v. OLMSTEAD.

In *McSorley v. McSorley* v. (2 *Bradf.* 188), decided in 1846, it was held that accounts of trustees of real estate are not within the jurisdiction of the Surrogate. In that case, in speaking of an account which had been taken before the Surrogate, the Vice Chancellor said, that in regard to the account which had been taken before the Surrogate, their dealings in respect of the real estate, were in their capacity of trustees of the power, and not as executors, and the subject was not within the jurisdiction of the Surrogate, unless perhaps by consent of the parties, and infants were not capable of giving their assent.

The first provision of the statute upon the subject (3 *Revised Statutes*, 6th ed., 102, § 80 a), provides that such trustees may from time to time, render and finally settle their accounts before the Surrogate in the manner prescribed by law for final settlement of the accounts of executors and administrators; and provision is also made for citing the proper parties, and for a decree of the Surrogate therein, and that the decree shall have the same force and effect as a decree or judgment of any other court of competent jurisdiction. (*Laws of 1850*, chapter 272, as amended, 1866, chapter 115.) The Surrogate is also given power to compel such trustees to account, and to require security, and remove them, as provided by law for the giving of security by, or removal of executors, administrators or guardians. (*Laws of 1867*, chapter 782, section 1, as amended by chapter 482, of the *Laws of 1871*.) And the only other provision on this subject, is to be found in Ch. 359, of the *Laws of 1870*, section 3, applicable to this county only. It provides that the Surrogate of this county, on application of testamentary trustees, may revoke his letters, and discharge him from his trust, and appoint a successor.

SAVAGE v. OLMSTEAD.

None of these statutes, as it seems to me, confer upon this court, authority to direct the conduct of testamentary trustees, except so far as their accounting, giving security, their removal, and the appointment of a successor, are concerned, pursuant to the statutes above recited. The authority conferred by these statutes, as is adjudged by several of the authorities above cited, embraces all necessary powers by implication, to enable the Surrogate to do all things specifically authorized, but the power to direct the trustee, as to the administration of his trust, except on a decree entered on his accounting, does not seem to be incidental to the power conferred to require the accounting, and I am of the opinion that an attempt to enforce the order made by my predecessor would be an attempt to exercise an authority not conferred by the statute, and I do not think that respect for him would justify me in attempting to exercise a doubtful jurisdiction.

The petition must therefore be denied.

Order accordingly.

TORRY v. FRAZER.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—MARCH, 1877.

TORRY v. FRAZER.

In the matter of the Accounting of JAMES FRAZER, as guardian, of SARAH TORRY, and JAMES TORRY, minors.

A guardian who invests the funds of his ward on personal securities, assumes the risk of loss thereby.

He must also bear the expenses of litigation, in efforts to collect funds so invested.

THIS was a proceeding for the accounting of James Frazer, as guardian of Sarah Torry, and James Torry, minors.

The guardian filed his account to which objections were interposed by the counsel for the wards, and the matter was referred to Samuel Marsh, Esq., as auditor. The auditor filed his report to the effect that the amount of assets which came to the hands of the guardian was \$5,481.62, and that interest at 5 per cent., being the rate of interest on securities in which trust funds should be invested, amounted to \$716.46 aggregating the sum of \$6,198.08, and that the only deductions, were for commissions, \$179.26, necessary expenses \$87.24, leaving a balance in the guardian's hands of \$5,930.38. He also reported that a reasonable allowance to the guardian's attorneys would be \$150, for all services rendered by them as such.

The guardian filed exceptions to the report raising the objections that the auditor erred in charging interest on money received; that he erred in disallowing the guardian's disbursements of \$105.93, in the suit by him

TORREY v. FRAZER.

against Bogart and others ; \$150, paid his counsel for making the account, and going to New York, and \$150 additional paid his counsel for attending the accounting before the auditor, and for expenses, \$85.75, in two trips to New York city.

It appeared by the evidence that the guardian resided in Delaware county, in the state of New York, and that he invested some of the funds belonging to his ward in indorsed promissory notes, which, after somewhat expensive litigation, were lost, and he charged in his accounts the expenses of that litigation.

ADEE & SHAW, *for the guardian*
S. J. McKEE, *in opposition*.

THE SURROGATE.—The counsel for the guardian claimed that the loans on promissory notes indorsed, &c., was a proper exercise of the authority of the guardian, and that the loss resulting therefrom should fall upon the estate, and cites *White v. Parker* (8 Barb., 48), as authority for such an investment ; but an examination of that case does not sustain the point. In that case it was charged that the guardian had disposed of some of the trust property on credit, and taken notes or other personal obligation, for the purchased price in his own name. The learned judge says, that by so doing the guardian made the notes or obligation his own, and must account for them at the value of the property for which he took them. It is true that on page 53, the justice uses this language: "He could not take the notes, or other securities for money belonging to his ward in his own name, and if he does, he converts the property to his own use, and is *prima facie* accountable for it." The case of *Hart v. Ten-Eyck* (2 Johns. Ch., 76), it is claimed, recognizes such authority ; but in that case no such question arose. Doubtless, the expression

TOREY V. FRAZER.

to which attention was intended to be called by the counsel is to be found on page 75, where, in speaking of the duties of administrators and trustees, the learned Chancellor says: "I shall be always extremely averse to hold such characters responsible, on slight grounds, or where there is evidence of a fair and upright intention." The case of *Lowell v. Minott* (20 Pick., 116), does doubtless sustain the views of the counsel upon this point.

The case of *King v. Talbot* (40 N. Y., 76), cited by the same counsel, seems to be entirely adverse to the principle sought to be established in behalf of the guardian in this case. There it is stated that the English rule is settled, that a trustee holding funds to invest for the benefit of a *cestui-que-trust*, is bound to make such investments in the public debt, or in loans for which real estate is pledged as security, even in cases where discretion is left with the trustee. And the court held that an investment of the trust funds in stock of the Delaware and Hudson Canal Company; of the New York and Harlem Railroad Company; of the New York and New Haven Railroad Company; of the Bank of Commerce; of the Saratoga and Washington Railroad Company, was unauthorized. In *Ackerman v. Emmott* (4 Barb., 626), it was adjudged that in England, where trustees were invested with discretion they are confined in its exercise to real and government security; and after an examination of several authorities it is held, that they recognize the expediency of retaining that rule in this state, and the court held in that case that the rule prevailed in this state, and that it authorized a trustee to loan on real securities and public stocks of the State of New York, or of the United States, or to the New York Life Insurance and Trust Company, and that where that limit is departed from

TERRY v. FRAZER.

neither good faith, nor care, nor diligence will protect trustees in the event of actual loss, that they assume the risk, and are responsible accordingly, and this principle seems sustained by the case of *King v. Talbot*, above cited.

Perry on Trusts (Vol. 2, section 453), states the rule to be that "trustees cannot invest trust moneys in personal securities," citing a large number of authorities, and in section 456, it says, that this rule prevails in New York, and Pennsylvania, but that in Massachusetts it is otherwise.

In *Smith v. Smith* (4 Johns. Ch., 280), it was held that if a guardian, or other trustee, lends the money of the *cestui que trust* without due security, he will be responsible in case the borrower becomes insolvent, and the Chancellor, after discussing the question whether notes taken by the guardian which appeared to be good, should be credited to him, says: "In a case like the present, where the sums were comparatively small, and the habit of dealing according to the practice which we have reason to presume was pursued by the testator, and especially where the debtors were originally sound, and continued so to the time of taking the account by the master, I am induced to think, we may consistently with the policy and doctrine of this court, credit the guardian with the notes which he has ready to surrender. But in adopting this course, I mean to be understood, that if a guardian, or other trustee, loans money without due security, he must be responsible in case of insolvency."

It is apparent that the weight of authority in this State is against the right of trustees to loan trust funds upon personal security, and it is to my mind entirely clear, that the guardian of an infant should be held to as rigid an accountability as any other trustee

TORRY v. FRAZER.

and Justice MULLETT, in *White v. Parker* (above cited), well says: "That this inquiry involves the rights, duties and liabilities of one of the most delicate and important artificial relations known in civilized life; where the guardian is required to exercise a parent's watchfulness, care and solicitude, without a parent's hope; a relation by which not only the pecuniary rights, but the moral character, and all the elements of future respectability, prosperity and happiness of bereaved, unprotected children are confided to the care of one, who, however just and conscientious he may be, is uninfluenced by those affections which nature has so wisely provided for the security of guardians of helpless infancy and inexperienced youth."

From a careful examination of the authorities, and a due consideration of the rights of the infants in this matter, I am of the opinion that the guardian should be held personally responsible for the investment of the ward's money, in the personal securities mentioned, and which has been lost, and that he should also be made liable for the expenses attending the litigation, in efforts to collect the same.

The report of the auditor in this matter should in all things be confirmed.

Order accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—MARCH, 1877.

WHEELER v. RUTHVEN.

In the matter of the Settlement of the decree on the accounting of the executor of the last Will and Testament of CLEMENTINA RUTHVEN, deceased.

Where the sole assets of a testator consists of an estate in remainder, which does not fall in until some year after the testator's death, interest on legacies under his will is allowable only from the time such assets come into the executor's hands by the death of the life tenant, and not from a year after testator's death.

The rule as to a reduced rate of interest on legacies where less than the full rate has been realized applies only as between the executor and the estate; not as between the legatee and the estate.

THIS was a proceeding for the final accounting of the executor of Clementina Ruthven, deceased.

The testatrix made her will dated August 20th, 1862, which was probated in 1863, and in 1866, letters were issued by one Owens, as executor, who died soon after, and on November 6th, 1874, letters were issued to James A. Ruthven, the accounting executor.

The only estate of the testatrix, consisted of a residuary interest in certain property left by her father's will in which her mother had a life interest. The life tenant did not die until 1873, and up to that time no assets came to the hands of the executor.

In 1874, after the death of the life tenant, the present executor came into possession of the residuary estate, consisting of about \$30,000 in cash, and the undivided half part of a house and lot in 23d street, New York.

By her will, the testatrix gave some twenty-one general cash legacies to Wheeler and others, and by the twenty-second clause, she provided that in case her

WHEELER v. RUTHVEN.

estate should not be sufficient to pay all the legacies, those mentioned in the first fifteen clauses, should be first paid, *pro rata*, and that the balance after such payment, if any, should be applied *pro rata*, to the succeeding legacies.

The fifteen legatees named claimed interest upon their legacies respectively, from one year after the decease of the testatrix, upon the general principle that legacies are payable one year from the death.

M. S. THOMPSON, *for the executor.*

CHARLES EDWARDS SOUTHER, WM. VENVILL, JONATHAN EDGAR
and others, *for the legatees.*

THE SURROGATE.—The general rule stated by the counsel of the legatees who claim interest on their legacies from the death of the testatrix, or from one year thereafter, is fully sustained by the authorities cited. (*Williamson v. Williamson*, 6 Paige, 300; *Hepburn v. Hepburn*, 2 Bradf., 74; *Lawrence v. Embree*, 3 Id., 364; *Bradner v. Faulkner*, 12 N. Y., 472; *Campbell v. Cowdry*, 31 How., 172.

In *Wood v. Peneyre* (13 Vesey, 325), the general rule is stated to be that the personal estate is deemed to be reduced into possession within a year after the death of the testator, and upon that ground interest is payable on legacies from that time, unless some other period is fixed by the will. Actual payment may in many instances be impracticable within that time, yet in legal contemplation the right to payment exists, and carries with it the right to interest until actual payment. In *Pearson v. Pearson* (1 Schoales & Lesfroy, 10), the rule with respect to the legacies out of personal estate is said to be taken from the practice of ecclesiastical courts, where a year is given to an executor to collect the effects, and he cannot be called upon to pay before that

WHEELER v. RUTHEVEN.

time, because he cannot know until then, what amount there is to pay, in the case of legacies charged upon lands only where no day of payment is fixed, interest must be chargeable from the death of the testator, or not at all. In that case the Chancellor said that whether the funds bear interest or not, is entirely immaterial in the case of pecuniary legacies, and he cited the case of *Gearing v. Parker* (not stating where it is to be found) to the effect, that where the fund did not become disposable for payment of legacies till nearly 40 years after the death of the testator, the legacies were held to bear interest from the expiration of twelve months, if their should at any time be a fund for their payment.

These early English authorities seem to be the only ones apparently sustaining the claim of the first fifteen legatees in this matter, but they are also entirely unlike the present, for in this case, the testatrix had no control over the estate except for its disposition, subject to the life interest of her mother, and from the circumstances of the case, it seems impossible that she should have supposed she was devising a present interest, with the present beneficial enjoyment, for she knew that she had no right to its possession, and unless there is some imperative rule of law over-riding an obvious consideration of equity, I should be disinclined to deny the legatees mentioned in the latter part of the will, any right in the estate, by absorbing the whole of the estate in interest upon the fifteen legatees mentioned.

Roper on Legacies (2d volume, 1245), states the principle to be, that interest is payable on money generally, on the ground of delay in liquidation of the principal, and that it may be stated as a general rule that interest is payable on legacies from the time at which the principal becomes actually due.

WHEELER v. RUTHVEN.

In *Davis v. Swan* (4 Mass., 205), the same principle is laid down, that the interest is to be computed from the time when the legacy is payable; and according to Roper (p. 1245), where the time of payment of general legacies is fixed by the testator, as for instance when the legatee shall attain twenty one, or any other definite period, legatees will not in general be entitled to interest before the arrival of that period, for the reason that interest can only be due where there is delay in payment of the principal. The author then proceeds to state the exceptions to this rule, which are legacies for the support of children, to the widow, in lieu of dower, &c. (See also *Willard on Executors* 90.)

In *Bradner v. Faulkner* (12 N. Y., 472,) Chief Justice GARDNER says: "It is, however, enough for the appellants that the matter is left in doubt. They can rely upon the general rule, that no interest will accrue until it becomes by law the duty of the executors to pay the legacy." In *Lupton v. Lupton* (2 Johns. Ch., 614), it is held that a legacy, payable at a future day, does not carry interest until after it is payable, unless it is given to a child, and the parent by the will has made no other provision for its maintenance.

In *Dodge v. Manning* (1 N. Y., 298), the testator by his will gave all his real and personal estate to his wife, during her life, and after her death to his grandson; to his granddaughter he gave a legacy to be paid by his grandson out of the estate, in one year after he should become of age. He became of age 1830, but the widow's life estate did not terminate until 1832; it was held that the legacy was not payable until the termination of the life estate.

After a careful examination of all the authorities to which I have had access upon this subject, and a full consideration of the principles upon which interest upon

WHEELER v. RUTHVEN

legacies is allowed, as well as from the obvious injustice which would result from a different determination, I cannot resist the conclusion that the legacies in question do not bear interest until the decease of the life tenant. (See *Birdsall v. Hewlett*, 1 *Id.*, 32; *Glen v. Fisher*, 6 *Johns. Ch.*, 33.)

I am of the opinion that the account should be settled, and distribution made in conformity to that rule.

It must be admitted that there are some well considered authorities apparently adverse to this conclusion, but the general principle of interest being chargeable only from the time when the legacies are payable, together with the obvious overmastering equity of this case, leaves no reasonable doubt as to how the question should be determined in this particular case.

As to the question of so-called succession tax, it is quite clear that the estate of the testatrix vested in the legatees at the time of her death, October 28th, 1862. As to personal taxes of the City of New York, in case it shall appear that the decree cannot be perfected, and the estate distributed in time to avoid the payment of such taxes, there would seem to be no substantial danger to the estate in reserving a sufficient fund in the hands of the executor to pay any such taxes, if enforced.

This matter came up again upon the settlement of the decree, on a question as to the rate of interest to be paid on the legacies.

THE SURROGATE.—I am of the opinion that the legacies given by the will of the deceased, bear interest

WHEELER v. RUTHVEN.

from the time they became payable at the rate of 7 per centum per annum.

Wherever interest is recoverable by reason of the non-payment of money due, it is presumed to be at the lawful rate of interest.

It is true that as between an estate and the executors or trustees, sometimes interest is not allowed at all, at others it is allowed at a reduced rate, because no greater interest could be realized, or because of the good faith of the executors, or trustees in the management of the estate. *King v. Talbot*, 40 N. Y., 76.

The question of interest in this matter is between the legatees and the estate, and not between them and the trustees, and I entertain no doubt, that when interest upon legacies becomes payable it is payable at the current rate.

The decree should be settled upon that basis, and if the personal property shall prove insufficient to pay the legacies, proceedings will have to be taken for the sale, or mortgage of the real estate for the purpose of making up the deficiency, unless the residuary legatee, shall elect to advance sufficient to make up the deficiency.

Decree accordingly.

FURNISS v. FURNISS.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—MARCH, 1877.

FURNISS v. FURNISS.

In the matter of the Estate of W. P. FURNISS, deceased.

The authority of the Surrogate's Court over testamentary trustees is purely statutory.*

It has no power upon petition of a beneficiary, to compel trustees to complete an alleged purchase by them of the trust property.

If such a purchase were proved upon a final accounting of the trustees, the Surrogate's Court could compel the trustees to account for the price; but any remedy in the nature of a bill in equity to compel them to respond as if purchased, on the ground of their neglect, must be by action.

THIS was an application in the matter of, the estate of W. P. Furniss, deceased, to compel the executors to place to the account of the petitioner, as an investment the amount for which certain real estate was sold to one Rogers, book-keeper for the executor.

The petitioner, Leon Furniss, was a devisee and legatee, and by a decree of this court, the executors and trustees were to account to the petitioner for the amount and the nature of the investments held in trust for him, the rents and profits of which he was to receive.

The petition alleged that they sold by public auction, eight lots of ground located in this city, four of which were stated to have been purchased by said Rogers for the benefit of petitioner, the petitioner alleging that such purchases were without authority, and contrary to the duty of the trustees.

It appeared that three of the lots sold for \$23,500, and five of them for \$28,550. Thirty per cent. was

TURNISS v. TURNISS.

paid down, and the trustees took mortgages for the balance, the first of \$16,450, and the next for \$19,985; the mortgages were foreclosed for non-payment of interest. The first sold for \$8,500, and the other for \$10,000, to the trustees, who were the only bidders. In September, 1876, the petitioner requested the trustees to sell the lots; they were advertised, and the petitioner was called upon for instructions, but he declined to commit himself, but stated they ought to bring \$24,000; that four of the lots sold for \$13,025; the remaining lots, to make \$24,000, should have sold for \$3,000 each—the best price offered for two of them was \$2,100, and for the other two, \$1,800 each, and for that reason the trustees declined to sell them, but had them bid in for the benefit of the petitioner.

It appeared that the executors were empowered by the will to sell the real estate, at their discretion; that the income of that portion of the estate held by the trustees for petitioner was to be paid to him, the principal sum to go to his brothers and sisters, as he should appoint by will, but if he failed to appoint, then to them in equal shares, but in case judgment should be recovered against him, his interest was to cease, except that the trustees paid his necessary support, and the surplus to go to his sisters. The powers conferred upon the executors were discretionary, and the majority of them could exercise the discretion.

RUFUS F. ANDREWS, *for the petitioner.*

LORD JAY, & LORD, *for the executor.*

THE SURROGATE.—The authority of the Surrogate over testamentary trustees is purely statutory, the Supreme Court having general jurisdiction and authority over them, and I am not aware of any statute which confers authority upon this court to grant the relief sought in this proceeding.

FURNISS v. FURNISS.

By the Laws of 1850, (chapter 272, amended by chapter 115 of the Laws of 1866,) testamentary trustees were authorized to render and finally settle their accounts before the Surrogate.

By chapter 782, of the Laws of 1869, section 1, the Surrogate is empowered to compel such trustees to account in the same manner as executors, etc., and by chap. 482, of the Laws of 1871, the latter act was amended, so as to enable the Surrogate to require security from such trustees, in the same manner as he could require it of executors, etc., and by chapter 359, of the Laws of 1870, the Surrogate of this county is authorized on the application of an executor, trustee, etc., named in any will proved in his court, to revoke such letters, discharge such trustees, and appoint others.

These are believed to be all the acts relating to the authority of the Surrogate over the conduct of testamentary trustees. I am of the opinion that none of these embraced the power sought to be exercised in this proceeding, for it is not a proceeding for the purpose of procuring an accounting or security, or for removing or substituting a trustee, but is in the nature of a bill in equity to compel the executors, or trustees, to complete an alleged purchase and sale of the premises in question, on the allegation that they have neglected their duties in that particular.

If the question should arise upon final accounting of the trustees before this court and it should be adjudged that the sale was regularly made, and that they should have collected the purchased price, then undoubtedly, on such account, they should be charged with the amount, but as it is clear that the sale was not in fact made, but the bid by Rogers was made for the purpose of preventing a sacrifice of the property, and as the will conferred the largest discretion upon the trustees as to a sale, it

seems to me, it would be an unwarrantable invasion of their prerogatives, to attempt to control their discretion.

The examination of this case has led me to the conclusion that there is a defect in the law in respect to the the authority of this court, over testamentary trustees, and it seems to me that it would be reasonable as well as beneficial to confer upon the Surrogate full authority over testamentary trustees in respect to any property of a deceased person entrusted to them, but until such authority shall be conferred, it is my obvious duty to withhold its exercise.

It may be urged that 2 *Rev. Stat.* 220, section 1 is sufficiently broad to cover this case, and if they were acting in the capacity of executors such would undoubtedly be true, for the third subdivision gives the Surrogate full power to control the conduct of executors and administrators, and subdivision six provides, that the Surrogate shall have authority to administer justice in all matters relating to the affairs of deceased persons according to the provisions of the statutes of this State, but the limitation, according to the provisions of the statutes of this State is evidently designed to restrict the authority of the Surrogate in his control of those officers, over whom he has special jurisdiction by statute. If a larger interpretation could be given to this sixth subdivision it would confer authority upon the Surrogate to control the conduct of a trustee appointed by the Supreme Court. or a receiver of the assets of a deceased person, which evidently was never designed.

Petition dismissed.

WHEELWRIGHT v. WHEELWRIGHT.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—APRIL, 1877

WHEELWRIGHT v. WHEELWRIGHT.

*In the matter of the Estate of BENJAMIN F. WHEEL-
WRIGHT, deceased.*

Executors and administrators are not entitled to appropriate to themselves, from the funds of the estate, the commissions allowed by law, until the same have been awarded to them by the Surrogate on an accounting.

It seems that they may properly be charged with interest on sums or appropriated which otherwise would have produced interest to the estate.

They are not bound to part with possession or control of funds necessary to meet their commissions, until their claim to commissions has been determined by the Surrogate.

THIS was a motion to confirm the report of the referee made on the accounting of the executor in the matter of the estate of Benjamin F. Wheelwright, deceased. The only objection of any importance was that interposed by Washington S. Wheelwright, one of the legatees, to the effect that the referee, by his ninth finding, found that the executors, in January 1876, retained from the capital of the estate \$15,000 on account of their commissions, being \$5,000 apiece, and it was claimed that they had no authority to do so, and should have been charged by the referee with interest thereon from that time to the settlement. The evidence showed that notwithstanding the appropriation of said \$15,000 as commissions, the executors were unable to loan the funds of the estate, and were compelled to have in hand from \$15,000 to \$20,000, which could not be invested.

OWEN & GRAY, *for the executor.*

E. F. BAYS, *in opposition.*

WHEELWRIGHT v. WHEELWRIGHT.

THE SURROGATE.—By section 71 of the revised statutes 6th edition page 101, it is provided that on the settlement of the account of an executor, or administrator, the Surrogate shall allow to him certain commissions particularly stated in the section, and I am of the opinion that the statute referred to does not contemplate that the executor or administrator, will at his own pleasure appropriate the funds belonging to the estate as commissions, but that they do not become commissions, and are not set apart from the body of the estate until there is a settlement of their accounts. This being so the executors ordinarily would be chargeable with interest on the amount thus appropriated to the time when the account was settled; but in this case, I am of the opinion that no injustice has been done to the estate in question by disallowing the interest on the sum thus appropriated, for the reason that the proof shows, that if it had been retained it would not have earned interest as an ordinary investment. Yet the trustees might have realized some interest if the fund had been deposited in a trust company, and it seems to me that it would be a wise rule to adopt, to require trustees, after diligent and unsuccessful effort to invest the funds in their hands, in ordinary regular securities, to deposit the fund in a trust company so that some interest may be realized, and I think it my duty to recommend this practice, which seems not to have been generally observed, and I make this suggestion in the hope that it may become a general practice hereafter; but as such practice does not seem to have prevailed heretofore, I am disinclined to charge the trustees interest in this case on the fund uninvested, because of the non-deposit on interest in a trust company.

it may be urged,—in answer to the suggestion that no injury has been done to the estate by the appropria-

WHEELWRIGHT v. WHEELWRIGHT.

tion of the so called commissions, because of the inability of the trustees to make investments,—that the trustees appropriating these funds without authority, before they had been set apart for them, should be held to have misappropriated the funds of the estate, and so rendered themselves liable for interest thereon at full rates, in analogy to the rule laid down by the courts in the case of the ordinary unlawful use of the funds of the estate, in the business of the trustee; but the analogy does not hold good, for the reason that they have taken no more than they would have been entitled to reserve in their hands, as against any claim which might have been made against the estate, and therefore had not put the funds of the estate in any jeopardy, for they could not be compelled to so part with the funds of the estate, as to leave themselves dependent upon the uncertainty of sufficient funds being thereafter realized to pay their commissions, or turned over to proceedings to recover them back, but this court would justify them in retaining in their hands—though not in appropriating as their own—a sufficient fund to cover their lawful commissions to be awarded on settlement of their account.

I am therefore of the opinion that the report of the referee should be confirmed, and that the application of Washington S. Wheelwright should be denied.

Order accordingly.

M'LAUGHLIN'S WILL.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—APRIL, 1877.

McLAUGHLIN'S WILL.

In the matter of the Probate of the last Will and Testament of WM. P. McLAUGHLIN.

Intemperate habits, enfeebled condition and eccentricities do not disqualify a testator, unless his mind is so affected as to render him incapable of comprehending the condition of his property, or his relations to the persons who were or should be the objects of his bounty, or the scope and bearing of the provisions of his will.

Unjust prejudices and unreasonable jealousies, influencing the testator against a child, are not (there being no question of undue influence) sufficient to avoid the will.

If it does not appear, but that the habitual drunkard was always able to talk coherently and understand what he was about, and it appears that he was entirely rational when the will, drafted by himself, was executed, it should not be rejected.

THIS was a proceeding for the probate of the last will and testament of William G. McLaughlin, deceased.

Numerous objections to the probate were filed by Maria S. Moffatt, one of the daughters of the deceased, who received a bequest of but \$100. The widow received \$3,500, and the testator's daughter Zillah, and a son Alfred, were made residuary legatees. Several other bequests preceded the above, and by a subsequent clause he provided that certain deposits in Savings Bank in his name in trust for his daughter Zillah, and son Alfred, should belong to them respectively.

SMITH & WOODWARD, *for proponent.*

M. B. FIELD, *and others, for contestant.*

THE SURROGATE.—On the submission of the case, no question was raised as to the due and formal execution of the will in question, but it is claimed by the contestant's counsel, that the testator was not competent to make a will at the time the instrument propounded was exe-

M'LAUGHLIN'S WILL.

ented, on account of his intemperate habits and mental imbecility or derangement, and it is only necessary therefore, to refer to the testimony of the subscribing witnesses, so far as it relates to the mental condition of the testator, at the time of such execution, who testified upon that subject that the testator was of sound mind, memory, and understanding. The will was executed on the 21st day of May, 1875.

Charles P. Buckley, a subscribing witness, testified, that he was an attorney, and drew the will in question; that deceased was a searcher in the office of receiver of taxes in the city of New York, and spoke to him several times about drawing his will; that he had an interview with the deceased at witness' office on the subject within a week of the time when he drew the will; that he drew a draft and sent it to deceased who brought it back, and it was then engrossed; that he thinks there was one interlineation of a word, which did not indicate anything in particular; that the interview before making the draft of the will continued about two hours; that there were certain amounts left blank in the memorandum thereof furnished by the testator, which were filled up, but the scheme of the will was unchanged; thinks there was a blank in the amount given to the widow, but not as to Mrs. Moffat; that the draft was delivered to the testator for examination the day before the will was executed; that the testator read over the will as executed in the presence of witness. After its execution it was put in an envelope by the deceased, who wrote his name thereon, and left it sealed up, with the witness, and that the paper continued in his possession until testator's decease when he gave it to one of the executors. Witness said he never saw anything to indicate that the deceased was a person of improper habits. David M. Adsall

M'LAUGHLIN'S WILL.

the other subscribing witness testified among other things, that he had known deceased about six years; that he engrossed the will in question, and testified to the formal execution of the will.

Iduella McLaughlin, called for contestant, testified that she was the widow of deceased, was married to him September 16th, 1872, that she knew deceased when he was a young man, when he was a very lively and gay person; that his habits became intemperate; that he was a steady drinker; had seen him intoxicated, but it was not of frequent occurrence, it was not of daily occurrence. About a year and a half before his death, in May, 1875, he began to be quite feeble, and left business in June; went away for his health; attended to business daily until that time; there was a gradual failure of his system; noticed it about the last of May, or first of June; the disease was in the nature of consumption; he was emaciated; he was naturally a lively person, and at times was of excitable temperament; he was sometimes very abusive, as the result of intoxication, he, was violent at these times; that at one time she found him crouched in the corner of a dark room in his house about ten o'clock in the evening, he was warming his hands at the heater, that was in the year 1875, before June; didn't know that the testator had hallucinations. Deceased supplied his family very limitedly; cannot say that he gave them what was necessary; has brought home improper, decomposed food; that was, she thought in the fall of 1874; it occurred on many occasions; he went out of town for his health to New Baltimore; witness was with him until he died; was confined to his room and bed; that she never had any knowledge of his having made a will; heard it the next day after his burial.

On cross-examination, the witness testified that the

M'LAUGHLIN'S WILL.

family when she was married, consisted of testator's son William, his daughters, Maria and Zillah, and his son Alfred; that William died in January, 1874; that Maria is married, she resided at home till February, 1875; deceased was not present at the marriage; never knew testator to drink in the morning; had seen him under the influence of liquor on Sundays when he would be at home; he was in the habit of drinking when he was at home, in the evening always; he attended to his business until June sixth, 1875; that when she found him in the parlor as described, he was under the influence of liquor, but not to excess; he knew what he was about, she never saw him so intoxicated, that he did not know what he was about; that he was a very nervous man; that when he was found at night in the parlor, he was watching to see if his son-in-law, Moffatt, came to the house; he had forbidden him the house; he wanted to see if he visited it.

Maria Moffatt, called for contestant, testified that she lived at home until her marriage in February, 1875, since then has lived in Brooklyn, but visited home; that her mother died in January, 1872; that her father remarried in September, 1872; that her age was twenty-eight years; that her step-mother died November ninth, 1875; that she worked at home till her marriage; did servant's work; that there was a servant for the first few years, but not for ten years before she left home; that her father used intoxicating liquor all his life-time; for the last few years used it to a great excess, three or four years before she left home; it made him very quarrelsome, ngly, he found fault with the family constantly; when he came home in the evening he would be pretty well under the influence of liquor, cross and quarrelsome; would drink after he came home; used to have liquor concealed behind a box, which he sup-

M'LAUGHLIN'S WILL.

posed good folks didn't see, in his room near his desk ; would drink of it occasionally during the evening ; would find fault with trifling things ; when he got entirely under the influence of liquor he would perhaps be unable to speak plain, and could not read ; would come home very late at night for about a year before she left home ; sometimes so that he couldn't get into the house, and she opened the door for him, and in going up stairs he had to hold himself by the railing ; he looked very pale, and very bad ; after such occasion his room was in a very filthy condition, she had to take care of it ; that she had seen him drink in the morning frequently ; kept liquor in his closet in bottles and demijohns ; principally whiskey ; she had seen him drink twice or three times in the morning ; he usually laid abed all day Sunday, and drank continually ; that the last year she remained at home, he was very feeble, travelled very slowly ; very often pale, looked like a walking corpse. He would say, and do things, and afterwards deny it ; did not seem to remember ; would frequently deny things that he had just said.

On cross-examination, the witness testified, that from the time of her father's marriage to her leaving, she was away two or three times, two or three weeks at a time ; was away the entire month of February at Stamford, Connecticut ; there were six persons in the family, the others helped her, but that she did the principal work ; that she was in the habit of waiting for her father until he came home at night at 11 or 12 o'clock, as a general thing, for the last year that she was at home ; that before that time he was in the habit of coming home between 6 and 8 o'clock ; that she had seen him drink on Sundays, a dozen times a day ; that her father was 65 years old when he died ; that her

M'LAUGHLIN'S WILL.

father did not approve of her marriage ; he would be restless at night, and make a noise ; that the family would be kept awake by the noise, and were afraid he would do dangerous things, and would watch him ; heard him speak to the rest of the family ; would make his threats ; give his opinion ; that is the reason she supposed her father was opposed to her marriage ; that after marriage, on her return from Stamford she saw her father ; that he was pleasant, said nothing disagreeable, thought he had been drinking some ; that she had not seen him since ; that his objection to her marriage was that her husband was poor.

Phineas H. Kingsland, called for the contestant, testified : that he was employed as examiner, and searcher, in the Comptroller's office in the city of New York ; knew the testator at least twenty years ; was a searcher in the tax office ; that testator frequently employed witness make searches for the assessments ; that he was in the habit of meeting him almost daily ; considered him a very frequent drinker ; especially in the latter part of the period ; for nine or ten years seemed to be under the influence of drink pretty much every day ; never in such a condition that he could not go about ; when under the influence was talkative and sometimes violent, in his expressions ; was apt to be more excitable under the influence of liquor ; towards the latter part of his life was a good deal affected by the habit of drinking ; seemed to be in frail health ; went up and down stairs with great difficulty ; during the last year of his life, fell away in flesh, the face became thin and haggard ; thinks he was weakened in body and intellect, but seemed tolerably capable of pursuing his routine duties ; during the last year, while he was in the office, he seemed to be very irritable, and said, and did a great many things, that would cause merriment, especially if he was irritat-

M'LAUGHLIN'S WILL.

ed by others; his condition was such that his remembrance left him, because of his prostrated condition; witness did not employ him to make searches; it was his impression his mind had become weakened to a very great extent; never felt that he was irrational, or entirely irrational; this applies to his condition at any time during the latter period of his life, the last year, whether under the influence of liquor or not; witness considered him an habitual drunkard.

On cross-examination, witness said he never saw him drunk, but once or twice; never saw him when he seemed to be incompetent to take care of himself; that he thought he was a man of rather excitable temperament, quick temper; that he meant that his intellect was not quite so vigorous as it used to be.

The contestants here rested.

Joseph Farrington, a witness called for the proponent, testified: that he was a physician, and had been for twenty years, and attended the testator from the 2d of November, 1867; saw him occasionally at his own house, occasionally met him in the street, and at his office; had attended upon him personally, and upon members of his family; the last visit he made to him was on July 6th, 1875; visited him on the 2d and 6th of July; that so far as he had occasion to judge from conversation with him, he never saw anything that indicated any unsoundness of mind; he made no particular examination except as to his illness; died of lung disease; was occasionally in the habit of visiting the family; usually visited the deceased in the morning. This witness was a general practising physician.

John G. Bolen, a witness produced for the proponent, testified: that he knew the deceased in his lifetime over sixty years intimately, very intimately; saw him every two or three weeks; he called to see witness

M'LAUGHLIN'S WILL.

occasionally at his place of business; the last time he saw him was about the middle of May, 1875; had a conversation with him; met him . . . in the street; looked feeble; asked him about his family; asked him if he had made his will; he said "No." Witness said he would advise him not to let twenty-four hours go over his head, before he made a will; he said he would think of it; saw nothing in his conversation, or conduct, irrational; previously he had conversed with him about the terms of his will; three or four years before he died he told him how he was going to make it; that he intended to cut off his daughter Maria, and stated the reason, that he would sometimes go home, and find Maria away for two or three weeks at a time, and he didn't know where she was; that she would frequently go out with this young man; that he decidedly objected to the young man because of his lazy habits; was too lazy to earn his own living, and if she married him he would cut her off; she married him afterwards; he told witness that several times, at different interviews. Witness further testified that he had advised the widow in respect to this probate; that he advised her to take what her husband left her.

Seymour B. Moody, produced for proponent, testified as follows: that he was employed in the Bureau of Water Rates; knew the deceased some eight or ten years; had business intercourse with him; for the last four or five years—probably every week—making searches; conversing about business in the office; conversed with him frequently; that he seemed perfectly rational.

On cross-examination, he testified that deceased used more or less liquor; but witness never saw him intoxicated; usually saw him in business hours; saw him when he knew he had been drinking—frequently

M'LAUGHLIN'S WILL.

a daily occurrence—for the last two or three years of his life; the last year of his life, he was very feeble in health, thin, quite emaciated, complexion bad, moved but slowly; was a very excitable person, unusually so.

Isaac O. Rhines, for proponent, testified: that he was a tax searcher; had been so for twenty years; knew the deceased about seventeen or eighteen years before his death; in the habit of seeing him almost daily; had desks in the same office; conversed with him very frequently in reference to tax searches, and other matters; he was rational; was sometimes eccentric.

On cross-examination, he testified that towards the last of his life, testator was very weak, and pale; at times moved with a great deal of difficulty; the business of the office was usually routine.

John S. Vredenburg, for proponent, testified: that he was connected with the tax office, since 1847; knew the deceased since 1856; had frequent intercourse with him in a business way; we consulted as to what was proper to be done in particular matters as to searches; he seemed to be rational. In the Spring, of 1875, he appeared as usual; cannot say he ever saw any indication of his being irrational; he was excitable, headstrong; in the Spring of 1875, he was very much emaciated, looked very sick, hardly fit for business; he was very excitable, particularly when contradicted in argument; it was peculiar to him; he was in a bad way as long as witness had known him, but latterly was more excitable; his bad health appeared in his actions; when he was in these excited conditions, perhaps he was irrational to a certain extent.

This is substantially all the material testimony that bears on the questions involved in this probate.

In *Van Guysling v. Van Kuren* (35 N. Y., 70) Justice

M'LAUGHLIN'S WILL.

SMITH, (delivering the opinion of the court) cites with approbation, the language of Judge Davies in *Delafield v. Parish* (25 N. Y., 9), to the effect, that it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relation to the persons who were, or should, or might have been the objects of his bounty, the scope and bearing of the provisions of his will.

He must in the language of the case have sufficient active memory to collect in his mind, without prompting the particulars, or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relation to each other, and be able to form some rational judgment in relation to them.

A testator who has sufficient mental power to do these things is within the meaning, and intent of the Statute of wills, a person of sound mind and memory, and competent to dispose of his estate by will.

The testimony in this case notwithstanding the habits, and eccentricities of the testator, leaves no doubt in my mind, that his mind was not so affected by his habitual intemperance as to render him incapable of comprehending the condition of his property, or his relation to the persons who were, or should have been objects of his bounty, or the scope and bearing of the provisions of his will.

In *Peck v. Carey* (27 N. Y., 9), it was held that habitual intoxication, not the actual stimulus of intoxicating liquors at the time of executing the will, incapacitated the testator unless the excitement were not such as to disorder his faculties, and pervert his judgment.

Shelford on Lunacy, at p. 364, says: "Intoxication is, in truth, temporary insanity; the brain is incapable of performing its proper functions, there is temporary

M'LAUGHLIN'S WILL.

mania but that species of derangement when the exciting cause is removed, ceases, and sobriety brings with it a return of reason. In order to avoid a will made by an intemperate testator, it must be proved that he was so excited by liquor, or so conducted himself during the particular act, as to be at that moment legally disqualified from giving effect to it."

In *Lewis v. Jones*, (50 Barb, 645,) it was held, an habitual drunkard though subject to the control of a commission was not necessarily incapacitated from making a valid will. There is no doubt that the intemperate habits of the deceased, had to some extent affected his physical health, and his temper, and it may be his mental capacity, so that if there were evidence showing undue influence, that condition of mind would be the subject of consideration as to the effect of that influence upon his mind, and his disposition of his property, but in this case there is not even a suggestion of undue influence upon the deceased in respect to the will in question, or any of its provisions, and the argument of the contestant's counsel against the probate seems to be based upon the allegation of injustice to his daughter, Mrs. Moffatt, who, it appears had been attentive, and faithful in her service to her father and his family, but the proof also shows that she was married against his will, and that he threatened to disinherit her because of such marriage.

In *Clapp v. Fullerton*, (34 N. Y. 190,) it was held, that it was not sufficient to justify the rejection of a will, that the testator in other respects competent, entertained a mistaken idea that one of his daughters was illegitimate, if it was not the effect of insane delusion, but of slight, and inadequate evidence, acting upon a jealous and suspicious mind. In that case, Justice PORTER says: "The right of a testator to dispose of his estate

M'LAUGHLIN'S WILL.

depends neither on the justice of his prejudices, nor the soundness of his reasoning; he may do what he will with his own, and if there be no defect of testamentary capacity, and no undue influence, or fraud, the law gives effect to his will though its provisions are unreasonable and unjust."

In *Seguine v. Seguine*, (3 *Keyes*, 663), Justice WRIGHT says: "But if the son had been wholly disinherited, not in favor of the brother, but of parties strangers in blood to the deceased, it would be no ground of itself for avoiding the instrument. A man has a right to make whatever disposition of his property he chooses, however absurd, or unjust."

"A disposing mind," said CRESSWELL, J., in *Earl of Sefton v. Hopwood* (1 *Fost. & Fin.*, 578), "does not mean that he should make what other people think a reasonable will, or a kind will, because by the law of this country he has absolute dominion over his own property, and if he, being in possession of his faculties, thinks fit to make a capricious, harsh, or cruel will, you have no right to interfere: that would be to make his will for him, and not allow him to make it."

In *Reynolds v. Root* (62 *Barb.*, 250,) JUSTICE MULLIN says: "It is a mistake to suppose that the testator is bound to make a will that others acquainted with him and his situation, may deem best. No greater injustice could be done in many instances by a testator than to so dispose of his property as to be what the world would call just."

When the law authorizes a person to make such a disposition by will of his property as he chooses, it presupposes that a person of sane mind may be influenced by unjust prejudices, and inexcusable jealousies, but it does not authorize the court to make a will for him or justify its refusal to probate, because it seems unjust.

M'LAUGHLIN'S WILL.

The reason alleged by the testator for his discrimination against his daughter Mrs. Moffatt, seems entirely unjust, and puerile, and yet in the exercise of his lawful right he had authority to make just such an unworthy discrimination.

Notwithstanding the intemperate habits and eccentricities of the testator, I should hesitate to deny the probate of this will if the testimony of any single witness were uncontradicted in respect to the effect of his intemperate habits upon his mind, as there is no witness who testifies, that he was ever observed to be incapable of taking care of himself, when most under the influence of liquor, and the general scope of the testimony is, that he was always able to talk coherently, and to understand what he was about, and the testimony of the subscribing witness abundantly shows that he was entirely rational, when he executed the will. The terms of the will itself having been drafted by the testator, I think gives strong evidence of a sound, and disposing mind; and in the disposition of the question this court can not safely allow, either its sense of justice towards, or sympathy for a neglected child to influence it to set aside the intent, and will of a sane testator.

Decree admitting the will to probate accordingly.

KERRIGAN v. KERRIGAN.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—MAY, 1877.

KERRIGAN v. KERRIGAN.

In the matter of the Estate of JAMES KERRIGAN, deceased.

Under a direction in a will to pay annually a specified sum to a grandchild of the testator without further indication of the time of payment, the first payment is due on the expiration of a year from the testator's death.

The general rule is that an annuity, or periodical stipend, given by will, commences to run at testator's death, but the first payment is not due until the expiration of the first specified period computed from his death.

Payment of an annuity may be allowed in advance, under the statute, (2 R. S. 98 §§ 82, 83) where the assets sufficiently exceed known claims but the legatee must give security to refund if deficiency results. If the legatee is a minor, the general guardian receiving the payment must in addition to such security which is for the benefit of other persons interested in the estate, give security to the minor under 2 R. S. 91 § 47, for the faithful application of the money, &c., unless the security already given by the general guardian was fixed in view of the minor's interest in the legacy.

An order requiring executors to make payment of a legacy should not be granted without reasonable notice to the executors; but if it is so granted and the executors are before the court, the relief may be granted.

THIS was an application to vacate or modify an order made in the matter of the estate of James Kerrigan deceased, ordering the executor and executrix to pay forthwith to the general guardian of Margaret Kerrigan \$300, given by testator's will in the following language: "I further order; and direct my executor and executrix hereinafter named, to pay annually the sum of \$300, to each of my grandchildren hereinafter named, to wit: Margaret Kerrigan, &c., to be paid during the minority of said grandchildren, to the legally appointed guardian," &c.

It appeared that the testator died November 17th,

KERRIGAM v. KERRIGAN.

1876, and the only question raised was as to the time when the annuity became payable.

F. F. VAN DERVEER, *for the executor.*

E. D. BROWN, *in opposition.*

THE SURROGATE.—The counsel for the petitioner urges, that the annuity is payable immediately on the death of the testator, because it has been held that a legacy given for the support of an infant, bears interest from the date of the death of the testator; and he reasons, that interest begins to run because of the non-payment of what is in fact payable. This undoubtedly is plausible reasoning, but the exception in favor of infants which allows interest, does not necessarily carry with it the idea that the principal is payable at the time, when the interest under that exceptional rule is allowable. Indeed the language of the will in this case requires the payment of the \$300, annually; in other words—it is to be made an annual payment, and therefore in order to be an annual payment, it must at least run one year before the payment, else it would be a payment in advance, instead of annually.

According to *Williams on Executors*, page 1192, if an annuity be given by will, it shall commence immediately from the testator's death, consequently, the first payment shall be made at the expiration of a year, next after that event; where the annuity is expressly directed to commence within a year, as of the first quarter day after the testator's death, or where the annuity is given with direction that it shall be paid monthly, the money will be due at the first quarter day, in the former case, and at the end of the first month after the testator's death, in the latter, although not payable by the executor till the end of a year.

According to *Roper on Legacies*, page 876, if the bequest be merely in the form of an annuity, as a gift to

FERRIGAN v. KERRIGAN.

B. of an annuity of \$100 for life, the first payment will be due at the end of the year after the testator's death; but if a disposition be of a sum of money, and the interest of it is given as an annuity to B. for life, the first payment will not accrue, before the expiration of the second year, after the death of the testator.

In *Griswold v. Griswold* (4 *Brad.*, 216), it was held that where a will provided for payment of an annuity to the testator widow in quarterly payments on the first Monday of January, April, July, and October; to commence immediately after the testator's decease, who died August 4th, that there should be no apportionment, and that the full quarterly payment became due on the first Monday of October succeeding testator's death. In that case, Surrogate BRADFORD said, "The testator died on the 4th day of August, 1856, and it is claimed that the first instalment of the annuity became instantly due on his decease. I think otherwise. The language of the will, calls in the first instance for a certain sum annually. Had there been no specific direction the first payment would have become due at the end of the year, but the provision for quarterly payments anticipates this period. I entertain no doubt that in the absence of a time being fixed for the payment of an annuity, it does not become payable until the end of a year from the decease of the testator, and that the question whether it bears interest or not is not controlling upon that question."

It is quite evident that this rule ought to prevail because if the annuitant should die before the end of the year, she would not be entitled to the full annuity, if to any, and the executor, I think, would not be exonerated, if he should pay before the end of the year in such event.

But the law has made a wise provision to meet the

KERRIGAN v. KERRIGAN.

necessities of such a case by permitting payment under the order of this court, on giving security for the return of such portion advanced with interest whenever required, where it shall appear, that there is at least one-third more of assets in the hands of the executor than will be sufficient to pay the debts, legacies, and known claims against the estate. (2 *Rev. Stat.*, 98, §§ 82, 83).

This security is designed to protect other parties interested in the estate.

2. *Rev. Stat.* 91, section 47, provides for the payment to the general guardian of a minor, who shall be required to give security to the minor to be approved by the Surrogate for the faithful application of and accounting for such legacy, and this security is required to protect the rights of the minor. If as such general guardian in this case security has not been given to cover the interest in this estate, then the security provided by both sections should be given, but if on the contrary the general guardian in question was appointed subsequent to the probate of the will in question, and has given security with reference to this estate as such guardian, only such security will be required as is provided in the 83d section above cited.

The order directing payment by the executors to the guardian was improvidently granted, without conformity to the 82d section of the statute above cited, which required reasonable notice to the executors of the application; but as the executors are now before the court, I think the relief contemplated by the statute above cited may be granted on this motion, and an order may be entered so modifying the former order as to allow the executor to pay to the guardian the sum of \$300 for the support of the infant, on his giving such security as is required by the statute.

Order accordingly.

MATTER OF ACKERMAN.

MATTER OF ACKERMAN.

*In the matter of the Estate of SUSANNAH ACKERMAN,
deceased.*

An annuitant sixty-six years of age, who had been accustomed to call on the executor regularly and frequently for his money, on which he was dependent for support, left his abode in May, without indicating an intent of remaining absent, and was never afterwards heard from. During the same month he had called and received about half a year's income. His physician testified that at the time when he disappeared he was suffering from incurable disease, under which he could not have survived more than three months. *Held*: That these facts were sufficient to sustain a finding that his death during the fall of the same year might be presumed.

THIS was a motion to confirm the report of a referee appointed to take testimony as to the death of Jacob Ackerman, a legatee under the will of Susannah Ackerman, deceased.

The referee found as matter of fact that said Jacob Ackerman, in May, 1872, then aged about 66 years, left the house of his brother-in-law, Hohokus, with whom he had re-sided about a year, without indicating any intention of remaining absent, though shortly previous he had expressed a wish to go to Baltimore where he had formerly resided with Mrs. Manly and Mrs. Jackson. He was dependent for support upon the income derived under the will of the deceased, amounting to about \$300 per annum, and was in the habit of calling upon the executor in New York, at stated periods for the money. The last call was in May, 1872, when he received \$142, after which time he made no further demand, and has not been seen by the executor.

Prior to May, 1872, he was broken down in health, and suffering, according to the testimony of his physician, from three progressive, incurable diseases, and the

MATTER OF ACKERMAN.

opinion of the physician was, that he could not have survived more than three months after that date. Diligent inquiry had been made in respect to him, and no information could be derived as to his being alive, nor of his arrival in Baltimore. When he left, he was anticipating the increase of his income, after May 1st, 1872, by reason of the expiration of a long lease held upon property belonging to the estate, and was in the frequent habit of asking the executor for more money.

The referee found that these facts afforded a satisfactory and reasonable presumption of the death of the said Jacob Ackerman, during the fall of 1872.

SACKETT & LANG, *for the petitioner.*

THE SURROGATE.—The only question to be considered is, whether the proof recited raises a presumption of the death of said Jacob Ackerman, at the time when it is found by the referee to have occurred.

In *Oppenheim v. Wolf* (3 *Sanf.*, Ch. 571) it appeared that Wolf departed from New York for Liverpool, in the steamship *President*, on the 11th day of March, 1841. The vessel was never afterwards heard from. Wolf's brother, as his general attorney in fact, delivered certain securities belonging to him to the plaintiff, against advances made by the plaintiff to take up certain notes, and in May, 1841, transferred additional securities for the same purpose; and in August, in the same year, on proof of the facts relative to Wolf's supposed death, letters of administration were granted to the Public Administrator on his estate. In discussing the question as to the death of Wolf, the Vice Chancellor said: "The usual time for steam passages across the Atlantic, from New York, has been 14 or 15 days; the longest passages have not exceeded 23 or 24 days. At page 576, he says, referring to the steamer, "the

MATTER OF ACKERMAN.

fact that she had resources of sails and steam, thus doubling her chance of making some port in case of disaster; and the impenetrable cloud that has always hung over her end, lead the mind irresistibly to the conclusion that she must have gone to the bottom before she had been six weeks out of New York; and the strong probability is, that she was lost a few days after her departure."

In *Sheldon v. Ferris* (45 Barb., 124) one Engel disappeared about the year 1856, and was not heard from at the time of the trial of the case, and the question arose as to his death, and the time of his death, and Mr. Justice INGRAHAM at page 128 says: "It was said, that there was no proof of Engel's death; it is true there is no direct proof, but his absence for 8 years without being seen, or heard of, warrants the presumption of his death, and when to this is added, the proof of his frequent declaration of intent to commit suicide, this presumption is strengthened, and will warrant the conclusion, that his death occurred about the time of his disappearance."

In *Merritt v. Thompson* (1 Hilton, 550), it was held that where an ordinary voyage is four months, and seventeen months elapsed without any tidings of the vessel, the master and crew will be presumed to be dead.

In *Eagle v. Emmet* (4 Bradf. 117), the general rule is stated to be that a party absent seven years without intelligence of his living, is presumed to be dead, and that the length of time may be abridged, and the presumption applied earlier, by proof of sufficient circumstances tending to show death, within a certain period.

In *O' Gara v. Eisenlohr* (38 N. Y., 296), it is stated that it is a general rule that the law presumes the continuance of life, and will not presume death until an absence of seven years, without being heard from.

FISHER v. BRITTON.

The proof in this case raises a reasonable presumption that Ackerman died within three months of his departure from Hohokus. The testimony of the physician renders it improbable that he could live long after that time. His entire dependence upon the income of the estate in question, his regular and frequent calls for the same before his departure, and his failure to call thereafter, all in my opinion combine to justify the conclusion reached by the referee.

Order accordingly.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—MAY, 1877.

FISHER v. BRITTON.

In the matter of the Estate of ELIJAH FISHER, deceased.

Annual rests for the purpose of giving the guardian a higher rate of commissions than would be allowed on the aggregate of the account cannot generally be made, unless the guardian has filed his account annually, or at intervals.*

But where the guardian's account makes annual rests for the purpose of charging himself with interest on the fund in his hands, the commissions may be computed on the aggregates at each rest.

THIS was a proceeding on the accounting of Dexter B. Britton, guardian, &c., of Alexander M. Fisher. The account was filed with annual rests, and credit for commissions at the rate of two and one-half per cent. for receiving, and the same rate for paying out, at each annual rest.

Objections were filed to the account by the ward, alleging that there was an overcharge for commissions.

C. W. BANGS, for the guardian.

*Compare *Cram v. Cram*, ante p. 244.

FISHER v. BRITTON.

THE SURROGATE.—None of the papers submitted to me show, whether or not the guardian has filed his annual account, as required by law. But on search of the records of this office no account seems to have been filed, and therefore according to the well-settled rule, the guardian is not entitled to charge his commissions in annual rests.

In *Morgan v. Hannas* (13 Abb. Pr., N. S., 361), Judge FOLGER stated the general rule to be that annual rests of the accounts of an executor, or other trustee cannot be taken for the purpose of allowing him commissions at full rates upon the balance then found; but where annual rests are required by the special direction of a court for the sake of charging the trustee with interest, or by rule of court, or by the provisions of the statute, then full commissions may be computed upon the funds, excluding the investment of the principal.

A guardian is required by statute to file accounts with the Surrogate each year, and his accounts will then show necessarily annual rests, and if he has made his accounts annually, or at intervals, he may be allowed commissions in full upon each account.

But the account as rendered by the guardian makes annual rests, and he charges himself with interest on the fund in his hands for the succeeding year respectively, and having made rests for that purpose, he is entitled to his commissions at $2\frac{1}{2}$ per cent. for receiving, for the first thousand dollars; $1\frac{1}{4}$ per cent., on the balance as it does not exceed \$9,000 in any instance, and $2\frac{1}{2}$ on sums paid out to the amount of one thousand, $1\frac{1}{4}$ per cent. for the amount paid out over and above that sum, and the account should be corrected in that respect, where there has been a charge of full commissions of $2\frac{1}{2}$ per cent. on any sum above \$1,000.

Order accordingly.

CURRAN v. SEARS.

NEW YORK COUNTY.—HON. D. C. CALVIN, SURROGATE.—APRIL, 1877.

CURRAN v. SEARS.

*In the matter of the probate of the last Will and Testament
of EDWARD J. SEARS, deceased.*

Under the provisions of the act of 1870, (Laws of 1870, Chap. 359), the Surrogate of New York County has full power, authority and jurisdiction, upon proceedings for the probate of a will, to pass upon the validity, construction or legal effect of any of the dispositions of the will when called in question by any of the heirs, next of kin, legatees or devisees, as amply and conclusively as the Supreme Court may do.

But the Surrogate should refuse jurisdiction in such a case unless all the parties interested in the controversy are brought before him.

A devise to the trustees of an incorporated college, and their successors forever in trust, &c. *Held:* To vest the estate devised in the college as a corporation.

A devise to an incorporated college for its legitimate purposes, subject to the payment of an annuity by the devisee to the testator's widow for life. *Held:* Valid. In this respect, there is no distinction between a devise of realty and a bequest of personalty.

The act of 1860, (Laws of 1860, Chap. 360) prohibiting bequests, &c., to charitable, literary, &c., institutions of more than one-half of testator's estate—construed and applied. And *Held:* That the Surrogate will not undertake, by reference or otherwise, to ascertain the amount of the devise, until the party interested in the disputed devise is brought in; and in the meantime probate will be suspended.

THIS was a proceeding for the probate of the last will and testament of Edward J. Sears, deceased.

Objections were interposed by Sarah Curran and Maria Sears, sisters, and Mark Sears, a brother of the testator.

There was no question as to the due execution of the will, and the contestant waived all objections to the probate of the will as a will of personal property. It was contended that the will could not be admitted as a will of real property, on the ground of the invalidity of

CURRAN v. SEARS.

the seventh clause of the will disposing of the testator's real estate.

The grounds of the objection were:

First, that the devise to the trustees of Manhattan College and their successors was to them and not to the college.

Second, that if the devise were held to be adverse to the college, it was void, because the college had no capacity to take and hold the property in trust.

The seventh clause of the will was as follows:

"*Seventh*, I give and devise all my real estate, consisting of two brown stone houses, and the lots on which they are erected, viz: House and lot No. 244 E. 49th street, between 2d and 3d Avenues, and the house and lot 106 East 61st street, between Lexington and 4th Avenues, in the city of New York, to the trustees of Manhattan College in the city of New York, and their successors for ever, in trust to receive the rents, issues, and profits thereof, to apply the same to the use of said Manhattan College for the following purpose, to wit. To found and maintain a Latin professorship in said college to be called the Sears professorship."

The foregoing devise is made to said trustees on the *express condition*, that out of the rents, issues and profits of said real estate, the said trustees, and their successors shall pay to my wife, Catherine Irwin Sears, an annuity of \$1,500 per annum for and during the term of her natural life, the same to be paid to her in monthly or quarterly payments as the said Catherine Irwin Sears may elect.

"After the death of my said wife, but not before, I authorize and empower the said trustees, and their successors, in their discretion, to sell any, or all, *the real estate hereby devised in trust*, viz.: the two houses and the lots above mentioned, and invest the proceeds thereof,

CURRAN v. SEARS.

and from time to time to change the said investments as they may be advised, and to receive the rents, profits, issues, interest, and income thereof, arising from such investment, and to apply the same, in the same manner, and upon the same trusts as those on which said real estate is devised."

JOHN PYNE, *for opponent.*

DEVELIN, MILLER & TRULL, *for Manhattan College.*

D. M. SHAW & EDWARD PATTERSON, *for contestants.*

THE SURROGATE.—The first question to be considered in this matter is, whether this court has the power to determine this question.

Prior to the statute of 1870, chapter 359, (applicable to the Surrogate of this county only), the Surrogate had no authority to construe wills, except so far as it became necessary on the final accounting, and the proponent's counsel objects to the jurisdiction of the Surrogate to pass upon the questions sought to be raised by the counsel for the contestants.

This enquiry must be answered by the language of the act, and the reasonable inferences to be drawn therefrom, as this court is one of peculiar and special jurisdiction, and can only exercise the jurisdiction and powers by which, a favorable construction of the statute are found to have been conferred upon it.

Redfield on Surrogates, page 22, says : " The principle is now fully established by authority and practice, that although where the statute directs the Surrogate to proceed in any certain way, he must proceed in that way and no other ; yet, if justice demands that in regard to some subject that is within his jurisdiction he should exercise an incidental power which has not been expressly given to him by the statute, he should not for that

CURRAN v. SEARS.

reason, decline to exercise it." In the *matter of Brick* (15 Abb. Pr., 12), Judge Daly, sitting as Surrogate, held, that in all matters submitted to their cognizance, Surrogates are authorized to proceed according to the course of courts, having by the common law, jurisdiction of such matters, except so far as they are restricted by statute, and they have such incidental powers, as are necessary to carry those which are given them into effect, and the eleventh section of the act of 1870, above referred to, provides that in any proceeding before the Surrogate of the County of New York, to prove the last will and testament of any deceased person, as a will of real or personal estate, or both, in case the validity of any disposition contained in such will is contested, or their construction or legal effect called in question by any of the heirs or next of kin of the deceased, or any legatee, or devisee, named in the will, the Surrogate shall have the same power, and jurisdiction, as is now vested in and exercised by the Supreme Court, to pass upon, and determine the true construction, validity, and legal effect thereof; and the same section provides for the entry of his decision in his minutes, and for the review by appeal by any of the heirs, next of kin, legatees, or devisees, in the same manner, and with the same effect as appeals may be taken from his decision admitting or refusing probate. The effect of this statute has been the subject of considerable discussion on the part of the profession, but it seems never to have been judicially determined.

The principal objections which have been urged against the general authority of the Surrogate of this county, to entertain proceedings for the construction of wills, are *first*, that that jurisdiction has hitherto been exclusively vested in the courts exercising equitable authority, and *second*, that there is no provision in the

CURRAN v. SEARS.

act in question or otherwise, for the citing of legatees or devisees, for the purpose of such construction.

When these questions were first raised, I was inclined to the opinion that in consequence of these defects or omissions of the statute, it would be unwise for this court to entertain jurisdiction for the purpose of a construction of a will except so far as such determination became necessary in passing upon the probate of the will; but upon a more careful examination of the terms of the section, it is quite clear to my mind that the Legislature intended by it to confer upon the Surrogate of this county full power, authority, and jurisdiction, upon probate, to pass upon the validity of any of the dispositions of said will which should be contested, and upon their construction or legal effect, when called in question by any of the heirs, next of kin, legatees, or devisees as amply, and conclusively as the Supreme Court may do, and I am of the opinion that it is my duty to accept that jurisdiction and responsibility, whenever presented. And when the act in question confers that jurisdiction and defines its effect upon the parties interested, I entertain no doubt of my authority as an incident to the performance of that duty to bring in all the parties interested for that purpose; but I am equally clear in the opinion that where a case has been submitted to me, without such parties being called in, I ought to refuse to exercise the jurisdiction except so far as it may become necessary for the purpose of passing upon the probate of the instrument in question, as a will of real and personal property, until such parties are brought in.

It is conceded by the counsel for both parties, that Manhattan College in question was incorporated by the regents of the University under the authority conferred upon them, Chapter 184 of the Laws 1853, and referred

CURRAN V. SEARS.

ence to that chapter shows that such organization is under the authority of trustees who have the management of the college, and the act provides for such college holding and possessing real and personal property to an amount specified.

The next question to be determined is whether the will in question by the seventh subdivision devised the real estate to the trustees as *individuals*, rather as constituting the corporation of Manhattan College, and it is claimed by the learned counsel for the contestant, that the devise in question was to the trustees, as contra-distinguished from the college, the college being a beneficiary together with the widow, for which he cites *Englis v. Trustees of Sailor's Snug Harbor of N. Y.* (3 *Pet.*, 99), where it said that a testator in appointing trustees may designate them by official titles instead of by name, in which case they take as if they had been designated by proper names; but in that case the devise was to the Chancellor of the State of New York, Mayor and Recorder of the city of New York, President of the Chamber of Commerce in the city of New York, President and Vice President of the Marine Society of the city of New York, Senior Minister of the Episcopal Church of said city, and Senior Minister of the Presbyterian Church of said city; in trust to erect and build an Asylum or Marine Hospital, to be called the Sailor's Snug Harbor, for the purpose of maintaining and supporting the aged, and decrepit, and wherein our sailors, &c. There is a very wide distinction between that and the devise in question, for in that case there was no such corporation as Sailor's Snug Harbor, and the trustees named occupied no relation to any such corporation or enterprise, while in this case the trustees named are executive, and corporate officers of the college.

CURRAN v. SEARS.

In the *New York Institution for the Blind v. How*, (10 N. Y., 84), it was held that a bequest "to trustees" of an institution, was a bequest to the institution, although those having charge of it were in the charter called managers. They are still defined and treated as trustees, and known in law as such. See 1 *Rev. Stat.* 600, section 9 and 10, and 2 *Id.*, 462, section 33.

In the *Reformed Dutch Church v. Brandon* (52 Barb. 228), the devise was to the consistory of the Reformed Dutch Church of Prattsville, that is to the Ministers, Elders and Deacons, and their successors in office, to be held, used, or invested for the benefit and use of the said church in such manner, as they may deem best for the interest of the church, &c. It was held that the testator clearly intended that the Reformed Dutch Church mentioned, should have the benefit of the bequest made by him to the consistory provided the consistory could control the bequest, and at page 233 Mr. Justice MILLER says: The bequest to the consistory was in effect a bequest to the Church Corporation itself, and was not the less so because it was devised to those officers.

In *Bailey v. Onondaga Mutual Ins. Co.* (6 Hill, 476), a bond, executed by an agent, for the faithful performance of his duty, was to the directors of the company to be paid to them; their successors and assigns, and was held to be in legal effect made to the company, and that the company might maintain an action upon it in their corporate name, and that the board of directors being the only legal agents of the corporation, were to be regarded as its representatives in all their official acts and doings.

To the same effect, see *New York African Society v. Varick* (13 Johns., 38).

In the *Attorney-General v. Tancred* (Ambler, 351) a

CURRAN v. SEARS.

conveyance was made to the use of the Masters of Christ's and Caius Colleges, the Presbyterian College, the College of Physicians, the Treasurer of Lincoln's Inn, the Master of the Charter House, the Governor of Chelsea and Greenwich Hospitals for seamen in trust, it was held that the conveyance was for the benefit of the bodies corporate of the said colleges, and not for the fellows in their natural capacity. (See also the case of *Christ's College, Cambridge*, 1 *Wm. Blacks.*, 90.)

In *Manice v. Manice* (43 *N. Y.*, 303), the testator among other things directed his trustees to pay \$5,000 unto the treasurer for the time being of Yale College in New Haven, and requested the Trustees of the College to invest in New York securities, or on bond and mortgage, and accumulate the interest, &c. It was held at page 387, that the direction to pay the treasurer was a good gift to the college, the college having been shown to be capable of taking it.

From these authorities, and such consideration as I have been able to give the terms of the will, I am of the opinion that the testator use the term, Trustees of the Manhattan College and the Manhattan College, as synonymous, and both as designating the corporation ; and I am unable to perceive any good reason for his selecting the trustees instead of the college to be his trustees for the benefit of the college as *cestui-que-trustens*, particularly as there is no evidence to show that he had any particular acquaintance with, or confidence in them and it seems to me that if he had intended to vest the title of the estate devised in the trustees instead of the college, or corporation, he would have had some of his confidential friends appointed as executors and trustees for the purpose ; and I am therefore of the opinion that the estate devised by the seventh clause of the will was intended to, and did vest in the Manhattan College as a corporation

CURRAN v. SEARS.

This conclusion renders it unnecessary for me to consider the question so exhaustively and ably presented by the learned counsel for the contestants, that the devise is void, as in contravention of the *Revised Statutes* 723, section 15, upon the subject of the unlawful suspension of the absolute power of alienation, although I have examined the authorities upon the subject in detail in that especial interest; nor is it necessary for me to enter into the much debated and vexed question, whether charitable uses are abolished by our statutes. That question seems to have been set at rest by the case of *Homes v. Mead* (52 N. Y., 332), and it is conceded by the respective counsel that our statute upon uses and trusts (*Revised Statutes* 729, sections 55, 56, 60), authorize such a devise to the college in question for the purpose named in the will.

The next question to be considered is whether the trust in behalf of the widow, renders the devise void because of the incapacity of the college to take the same encumbered by that trust. The counsel for the contestant claims that the devise is void because the college has no power under chapter 318, of the laws of 1840, as enlarged by chapter 261, of the laws of 1841, to receive real estate in trust for another, and cites 2 *Revised Statutes* 57, section 3; but that section as it seems to me does not sustain this construction. Its provision is, that no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter, or by statute, to take by devise. That section does not attempt to limit the purpose for which a devise may be received.

In the *Matter of Howe*, (1 Paige, 214), a legacy was given to St. George's Church, in trust to pay the income to the testator's house-keeper, for life; after her death the income thereof to be applied to the purchase

CURRAN V. SEARS.

of a church library, and support of the Sabbath school in the church and other church purposes to which church contributions might be applied according to the tenets of the Episcopal Church, and the chancellor stated the general rule to be that corporations cannot exercise any powers, not given to them by their charter, or acts of incorporation, and for that reason, they cannot act as trustees in relation to any matter in which the corporation has no interest; but wherever property is devised, or granted to a corporation partly for its own use, and partly for the use of others, the power of the corporation to take and hold the property for its own use, carries with it, as a necessary incident, power to execute that part of the trust which relates to others.

The legacy was directed to be paid over to the Rector, Church Wardens and Vestrymen as representatives of the Corporators, who were bound to carry into effect the testator's will in respect to the same.

In the case under consideration, it is equally true that the substantial part of the legacy is for the benefit of the corporation, and it seems to me that it would be a very illogical, as well as inequitable construction that because a subordinate trust was created in favor of the widow that the intention of the testator to give the college the principal benefit of the devise should be defeated.

In *Philips' Academy v. King*, (12 Mass. 546,) it was held that a corporation is capable of taking and holding property as trustee.

In *Vidal v. Girard's Executors*, (2 How. U. S., 527), the corporation of the city of Philadelphia had power, by its charter, to take real and personal estate by deed and devise, and it was held that having this power, it might also take and hold property in trust in the same manner

CURRAN v. SEARS.

and to the same extent that a private person might do Justice STORY, in delivering the opinion says, "Now although it was in early times held, that a corporation could not take and hold real and personal estate in trust, upon the ground that there was a defect of one of the requisites to create a good trustee, viz.: want of confidence in the person; yet that doctrine has been long since exploded, as unsound, and too artificial, and it is now held that where a corporation has a legal capacity to take real and personal estate, there it may take, and hold it upon trust, in the same manner, and to the same extent, as a private person may do.

It is true, that if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be capable of executing it, but that will be no ground to declare the trust itself void, if otherwise unexceptionable, but it will simply require a new trustee to be substituted by the proper court possessing equity jurisdiction, to enforce, and perfect the subject of the trust."

In *Tinkham v. Erie Railway Co.* (53 Barb., 393), where the question was determined as to the right of the defendants, a corporation, to take real estate, subject to the condition, that a portion of the land should be kept open as public streets, it was adjudged that such condition was valid, and that the corporation could hold the estate; and Justice BALCOM, in delivering the opinion of the court, recognizes the full authority of the case of *Howe's Executors* (above cited), as applicable to real estate as well as personal.

It is urged by counsel for the contestant, that the authorities above cited, are not applicable to a case where there is a devise in trust, while he recognizes the soundness of the rule as laid down in respect to person-

CURRAN v. SEARS.

al property, but I am unable to appreciate any substantial distinction between a bequest and a devise, in respect to the question of the authority of the corporation to take and execute the trust. The statute (1 *Revised Statutes*, 739, sections 56, 60) authorizes incorporated colleges to receive, and hold in trust, real and personal property, to found and maintain professorships, and scholarships, (among other things), which seems to put real and personal property upon the same footing; and I think the devise in this case is in strict conformity to that authority, and the fact that the devise is encumbered by a subordinate trust, ought not to deprive the college of the benefit of devise, or defeat the obvious intention of the testator.

If the principle be admitted—which seems to be inevitable, from these authorities—that a corporation may receive property in trust, and that its functions are dependent upon its charter, and the statutes relating to it, it must be admitted that there is no statute expressly authorizing a corporation to receive and execute a trust outside of the legitimate purposes of its organization, nor is there anything in the statute of Uses and Trusts, which forbids the taking by a corporation, of real estate, by devise, in trust for a third party, except such as are implied by the statute of 1840, above cited. And it seems to me, that if the case of *Howe's Executors* above cited, is good law in respect to the taking and holding personalty in trust, partly for the benefit of the corporation, and partly for the benefit of a third person, the principle is equally applicable, and reasonable, when a devise of real estate is received, subject to a subordinate trust to the widow, as in this case. And it is impossible to conceive that the learned Chancellor in that case, and Mr. Justice BALCOM, in *Tinkham v. Erie Railway*, and Justice STORY, in *Vidal*

CURRAN v. SEARS.

v. *Girard's Executors*, should have used language applicable alike to a devise of real estate and a bequest of personal property, when they intended only to embrace a bequest.

Upon the best consideration that I have been able to give the subject, I cannot appreciate any such distinction as is sought to be made in this case, and I do not perceive any good reason for denying the college in question the benefit of the devise, because coupled with a subordinate trust to the widow, as a condition subsequent.

I am therefore of the opinion that the devise to the Trustees of Manhattan College, in trust for its legitimate purposes, though subject to the trust in behalf of the widow, is valid, and vested the title in the corporation, and that it has full power, and ample authority to execute the trust in behalf of the widow, as well as for its own benefit.

The next and final question to be considered in this matter is, the effect of Chapter 360, of the laws of 1860, which provides that no person having a husband, wife, child, or parent, shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association, or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more; and chapter 319, of the Laws of 1848, which provides that no person leaving a wife, child, or parent, shall devise or bequeath to a benevolent, charitable, scientific, or missionary society or corporation, more than one-fourth of his estate, after payment of his or her debts, and such devise and bequest shall be valid to the extent of one-fourth, and no such devise, or bequest shall be valid in

CURRAN v. SEARS.

any will, which shall not have been made and executed at least two months before the death of the testator; and the earlier portion of the same section limits such a devise, or bequest, to a sum the clear annual income of which shall not exceed \$10,000, but the contestant's counsel, in his argument, does not raise any question under the latter section, whether because as to the prohibition respecting the annual income of the devise, he regards the remedy as vesting exclusively in the attorney general, against the corporation, or whether as to the question of the excess over one-fourth, and the time of executing the testament, he considers the provisions of the act of 1848, repealed, by chapter 360, of the *Laws of 1860*, above cited, does not appear.

I think there is no reason to doubt that the act of 1848, as amended by ch. 649, *Laws of 1872*, which is confined to benevolent, charitable, literary, and scientific, missionary, mission, or other Sunday school purposes, for mutual improvement in religious knowledge, for the furtherance of religious opinion, does not apply to an institution like Manhattan College.

In *Buscom v. Albertson* (34 N. Y., 616), Justice PORTER, in referring to the act of 1860, says: "The purpose of the law is not only expressed in its title, but is apparent on its face. It was designed to regulate, and restrict the power of the testator. It was neither conceived nor formed in a spirit of hostility to charitable societies; on the contrary, it enlarged the proportion of a testator's estate, which he might dedicate to charitable uses, in exclusion of the claims of his own immediate family," and in *Chamberlain v. Chamberlain* (43 N. Y., 424), Justice ALLEN treats the act as applicable to an educational institution incorporated by the Regents of the university, and as a subsisting prohibitory act upon the subject.

The act of 1860 was doubtless made for the purpose

of protecting the rights of husband, wife, child, or parent. If that academy is covered by the act of 1860, there seems to be no doubt that it covers the college in question, and the term literary and scientific association or corporation, would seem fully to define the character of the Manhattan College, and I have no doubt of its application to the college in question

The point is not raised in this case that there is no one but the widow interested in this question, and that she desires the enforcement of the devise, according to the terms of the will; but in *Harris v. American Bible Society* (4 Abbott Pr., N. S., 421), Justice FULLERTON, in discussing this question, says: "This General Term held, I think properly, that the prohibition is peremptory, and may be insisted on by any person who would derive benefit therefrom. The language is absolute, and if courts have power in any case to judge concerning the probable motives of the Legislature, and may imply accordingly an exception to the positive terms of the statute (on which no opinion need now be expressed) I am unable to discover any such ground for such a proceeding in this instance," and in that case it was held that the prohibition is peremptory, and that the half is to be computed with reference to the estate at the time of the testator's death, and in *Chamberlain v. Chamberlain*, above cited, it is decided that in ascertaining the estate, only one-half of which can be devised to charitable or educational corporations, under the act of 1860, the widow's dower and the debts are to be first deducted, and this latter case, seems to leave no doubt as to the right of the contestants in this matter to raise the question growing out of the prohibition of the act of 1860. But as the Manhattan College, (the legatee under the disputed devise,) is not a party to these proceedings, I am of the opinion that I ought not

MATTER OF M^CFEELEY.

to order a reference to determine the amount of the estate, to apply the act of 1860, or take any further proceeding in respect to it until said college shall be brought in. And when brought in, if counsel for the contestant shall so elect, a reference may be made to take testimony, and report upon the question of the amount of the devise to said college, over and above the widow's dower, and the debts of the estate, and until the coming in of the referee's report, and the determination of the question under section 11, of chapter 359, of the Laws of 1870, the probate should be suspended.

Order accordingly.

KINGS COUNTY.—HON. WALTER L. LIVINGSTON, SURROGATE.—JANUARY, 1877.

MATTER OF M^CFEELEY.

In the matter of the Real Estate of JAMES D. MCFEELEY, deceased.

If lands of a decedent, sold by order of the Surrogate, are in a city, notice of the sale must be posted in the ward where the land is situated.

The omission to post notice there cannot be disregarded by the Surrogate on an application to confirm the sale.*

The party making such sale is chargeable with notice of the defect of posting, and therefore cannot claim as a *bona fide* purchaser.†

To divest one of his property by a special statutory proceeding, every direction of the statute must be strictly complied with.

THIS was an application on the part of a creditor of the estate of James D. McFeeley, for confirmation of

* To same effect, *Matter of Kelly*. Abb., *New Cas.*, 102

† *S. F. Fryer v. Rockefeller*, 63 N. Y., 268; 84 Hun, 800; *Watson v. Church*, 3 Hun, 80; *Knight v. Moloney*, 4 Id., 33.

MATTER OF M'FEELEY.

the report of the sale of certain real estate of the decedent. The sale was made under an order of this court by a freeholder, the administrator having refused to proceed with the sale.

Notice of the time and place of sale was published for six weeks in a daily newspaper published in this county where the premises were situated, and was also posted for the same length of time in three public places in the different towns and wards in which the several parcels of lands to be sold were respectively located, but the notice was not published in the ward in which the sale took place.

All the proceedings in relation to giving notice of the sale were conducted on behalf of the freeholder by the attorney for the creditor in this matter, and the creditor himself became the purchaser of the premises at the sale.

JOHN H. BERGEN, *for the creditor.*

PHILIP S. CROOKE, *for the administrator.*

THE SURROGATE.—The twenty-fifth section of the fourth title of chapter sixth of part second of the Revised Statutes requires that notice of the time and place of holding the sale shall be posted for six weeks, at three of the most public places in the town or ward where the sale shall be had. (2 *Rev. Stat.* 104.)

That was not done in this case, and the omission is not cured in this court by the remedial provisions of chapter 82 of the laws of 1850, (as amended by chapter 260 of the laws of 1869, and by chapter 92 of the laws of 1872), inasmuch as the fourth section of the said act of 1850 expressly provides that it shall not be construed as authorizing any Surrogate to confirm any sale of the real property of a deceased person, unless upon due examination he shall be satisfied that the provisions of

MATTER OF M'FEELEY.

the fourth title of chapter sixth of part second of the Revised Statutes have been complied with as if the act of 1850 had not been passed.

Nor can the said defect be disregarded under the provisions of fifty-ninth section of the same title, which declares that no offence in relation to the giving of notice of sale, or the taking down or defacing such notice, shall effect the validity of such sale to any purchaser in good faith, without notice of the irregularity (2 *Rev. Stat.* 110). Because the attorney for the purchaser in this case must be held to have had notice of an irregularity in the proceedings which were conducted by himself; and the purchaser was affected by such notice to his attorney. (*Sugden on Vendor*, vol. 2, p. 757; *Bank of the U. S. v. Davis*, 2 *Hill*, 451.)

In view therefore of the familiar rule of the law that to divest a person of his property by a special statutory proceeding, every direction of the statute must be strictly complied with, which rule has been applied by the courts to sales of this kind (*Redfield Surr. Pr.*, 255), I must deny the present application with leave to sell the property again on proper notice.

Order accordingly.

MATTER OF O'NIEL.

KINGS COUNTY.—HON. WALTER L. LIVINGSTON, SURROGATE. —JANUARY, 1877.

MATTER OF O'NIEL.

In the matter of the application for letters of administration on the Estate of ELIZABETH O'NIEL, deceased.

The administrator of a deceased husband, whose wife died before him, is not entitled to administration on the estate of the wife.

THIS was an application by the administrator of the husband of Elizabeth O'Niel, deceased, for letters of administration on the estate of the wife, she having died without leaving descendants, and before her husband, who subsequently died without having taken out letters of administration on his wife's estate.

THE SURROGATE.—The husband's administrator was not a relative of the deceased wife entitled to succeed to her personal estate, and under the statute only such relatives are entitled to letters of administration (2 *Rev. Stat.* 74. § 27).

It is true that an exception to this rule is made in favor of the husband of a married woman dying intestate, but it is limited to him personally. (*Id.*, § 27 and 29).

Application refused.

MATTER OF LOPER.

COUNTY OF KINGS.—HON. WALTER L. LIVINGSTON, SURROGATE.—
FEBRUARY, 1877.

MATTER OF LOPER.

In the matter of the Estate of ISAAC C. LOPER, deceased.

The statute empowering the Surrogate to authorize executors and administrators to compromise or compound debts,—does not sanction their entering into a composition deed, giving debtors to the estate a long credit without part payment.

THIS was an application by the administratrix of the estate of Isaac C. Loper, deceased, for an order authorizing her to sign a composition deed whereby certain debtors, who were parties to the deed and who had made an assignment for the benefit of their creditors, would be enabled to continue their business for the term of three years in hopes of being able to pay their debts in full, or at least in a greater proportion than if the business were wound up by the assignee, in which latter event the creditors would probably not realize more than one-third or one-half of their claims.

By the terms of the proposed composition deed the administratrix assigned her claim to trustees who were also parties to the deed, and through whom the creditors were to be paid.

The deed also allowed each of the debtors to apply to his support, the sum of \$3,000, yearly, out of the proceeds of the business before making any payments to the creditors.

DAILY & PERRY, *for the administratrix.*

THE SURROGATE.—The deed has been signed by a large number, if not all, of the creditors of the debtors,

MATTER OF LOPER.

and it may therefore be assumed, for the purpose of this application, that the execution of the deed by the administratrix would be for the benefit of the estate represented by her.

But I can find no authority for making the order applied for in this case.

It is claimed by the learned counsel for the administratrix, that the authority is to be found in the statute giving the Surrogate power to authorize executors and administrators to compromise or compound any debts or claims belonging to the estate of their testators or intestates, but I cannot agree with him.

To compromise or compound a debt means to accept a part of it in satisfaction of the whole.

The present application is not anything of the kind. No part of the debt is certain to be paid, nor is it agreed that the debt shall be discharged on payment of part of it.

The application is to authorize the administratrix to part with all control over her claim for three years and to give credit for that length of time to a debtor who is now able to pay from one-third to one-half of his debts, in view of the probability of being able, within that time, to collect the whole or a larger proportion of the claim, while at the same time incurring the risk of losing the whole.

Such an agreement, however beneficial it might prove to the estate, if it resulted in the collection of the whole debt, is not in my opinion such a one as the Surrogate is empowered to authorize under the statute above referred to, and therefore the application must be denied.

Order accordingly.

NOTE.

BOOTH v. CORNELL, ante page 261.

After the foregoing pages were in type a judgment of the General Term of the Supreme Court was announced reversing the decision of the Surrogate in the above case, reported ante, page 261. The title on the matter on appeal is *Five Points House of Industry v. Amerman*, and the following opinion of the Court was delivered by

BRADY, J.—The Surrogate evidently did not question that the legacy vested, subject to the supposed condition. There can be no doubt that the legacy vested upon the death of the testator. Conditions are not favored. The language employed in this case is “to be applied to the uses of the farm in Westchester County.” The testator gave the sum, but annexed a wish or direction that it should be applied in a particular manner. The legacy is not a condition, “or provided,” or “upon the understanding,” but absolute as a gift, with a direction or wish annexed to or coupled with it. The word “uses” may be construed to mean “purposes.” The gift was applied to the purposes of the farm, which was to take care of children, and not to the farm itself, and if it have the force of a condition then it is a condition subsequent and not precedent. The plaintiff may yet apply the money to the farm in Westchester County. If a legacy is subject to being diverted on a failure of performance of the condition it vests nevertheless. If the legacy to the plaintiff is not absolute, but depends upon a subsequent condition, the time of performance has not expired. The mere fact that during a period it has no farm to which the fund can be applied, does not affect the right to receive the legacy. The condition may yet be performed. The decree is reversed.

DAVIS, P. J., and DANIELS, J., concur.

INDEX.

ACCOUNTING.

1. The Surrogate has jurisdiction upon the petition of one who received no notice of an accounting had by executors or administrators, to open the decree made on such accounting. *Wells v. Wallace*, 58.
2. Where a trustee died insolvent, having wasted the fund, and his administrators accounted without notice to the *cestui que trust*, and obtained a decree requiring them to pay the trust claim only *pro rata* with general creditors,—*Held*, That the Surrogate had jurisdiction to open the decree, on the petition of a substituted trustee, without notice to the heirs, next of kin and creditors. *Ib.*
3. Presentation by the substituted trustee of the claim to be allowed the full amount, is not necessary in such case, the administrators having had actual notice of the claim after testator's death, and having accounted before a substituted trustee. *Ib.*
4. On taking an account before an auditor, contestants are to be required to point out with reasonable certainty the grounds of objection to the claims of the executor or administrator; but they are not restricted to the objections first taken. *Larroux v. Larroux*, 69.
5. Where minors are interested, objections taken on their behalf, even on the final argument after the evidence is closed, should not be excluded as waived. *Ib.*
6. It is the uniform practice to pass upon and determine the state of an account rendered by an executor or administrator on the petition of a creditor or legatee, although there be no petition for a final accounting. But without a petition for a final accounting, a decree for distribution will not be made. *Tucker v. McDermott*, 312.
7. The fact that the court, in determining an action against executors, administrators or trustees does not charge them personally with the costs, is not conclusive in their favor, as to the allowance of such costs as paid by them, when their accounts are rendered in the Surrogate's court. *Ib.*
8. Where trustees, etc., are ordered to account at their own costs, the auditor to whom the account is referred has no power to charge the

costs on the estate; nor should the Surrogate do so, on a motion to confirm his report. *Ib.*

9. One of several executors or administrators may be compelled to account, and the account be contested, by his co-executor or co-administrator. *Matter of Ritch*, 330.
 10. An account so rendered may be referred to an auditor. *Ib.*
 11. The fact that the legatees consent to the account, and object to the contest, is not ground for refusing to refer the account. *Ib.*
 12. Wherever the Surrogate's court has power to compel the representative of an estate to account, it has implied power to pass upon the accuracy of the account, and to refer it to an auditor for this purpose. *Ib.*
- When Administrator held liable for full value of lease, made to the deceased and renewed by him.* See ASSETS, 2.
- Executor who has not filed inventory, no standing in court on accounting of his co-executor.* See COMMISSIONS, 4, 5, 6.
- Claim of exempt property made for first time on accounting, when not allowed.* See EXEMPT PROPERTY, 1.
- Objections by guardian on.* See GUARDIAN AND WARD, 3, 4.

ADMINISTRATION.

1. The fact that, on the death of the executor of a former estate, trust funds of that estate have come to the hands of his executors, does not give them an interest in the question as to who is entitled to receive new letters on the former estate, or to petition for a revocation of new letters because issued to one not entitled to receive them.
 2. An executor of an executor has no interest in the estate of the testator of the first executor, nor any control over its administration. *Fosdick v. Delafield*, 392.
 3. The public administrator has a right to administration with the will annexed in preference to the attorney in fact of disqualified next of kin, except where the will was made by a testator dying domiciled abroad, and was proved by exemplification of a foreign probate, under L., 1863, c. 403. *Matter of Blank*, 443.
 4. The administrator of a deceased husband whose wife died before him, is not entitled to administration on the estate of the wife. *Matter of O'Niel*, 544.
- As to the rights and duties of executors and administrators in administering the estate and for what expenditures they will be allowed.* See EXECUTORS AND ADMINISTRATORS.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

ADVANCEMENT.

1. On the question of advancement or ademption of a legacy, when raised

- by the executor, against the claim of the legatee, the burden is on the executor to prove satisfaction. *Piper v. Barae*, 19.
2. When a parent procures third persons to convey property to his daughter for a consideration, moving from himself, the presumption is that it is an advancement, equally as where he makes the conveyance himself. *Ib.*
 3. The circumstance that he subsequently executed a codicil, in which he made no reference to the legacy, has no weight on the question. *Ib.*
 4. Testator gave a legacy of \$1,500 to each of his daughters, expressing however, in the will, his intent to pay the legacies in his lifetime. Subsequently he procured a third person, for a consideration of \$1,600, moving from testator, to convey real property to one of the legatees, declaring, at the same time, that he intended to require the daughter to give him her note for the excess of \$100, to equalize his gifts. *Held*. That this showed payment of the legacy. *Ib.*
 5. Where a person having made advancements to his sons and daughters, in different sums at their request, during life, taking receipts expressing such sums to be a part of their apportionment of his estate, afterwards makes a will appointing executors, but making no testamentary disposition other than a direction that all his property be equally divided between his children, such advances must be taken into account in the distribution of the estate. *Camp v. Camp*, 141.
 6. *It seems* that an advancement made in stocks, and charged on the testator's books at an estimated value, may be regarded as no advancement, if the stocks be proved to have been valueless at the time the charge was made. *Marsh v. Gilbert*, 465.
 7. But to avoid the effect of an advancement, on such a ground, the evidence should be clear. *Ib.*

ANNUITY.

1. Under a direction in a will to pay annually a specified sum to a grandchild of the testator without further indication of the time of payment, the first payment is due on the expiration of a year from the testator's death. *Kerrigan v. Kerrigan*, 55.
2. The general rule is that an annuity, or periodical stipend, given by will, commences to run at testator's death, but the first payment is not due until the expiration of the first specified period computed from his death. *Ib.*
3. Payment of an annuity may be allowed in advance, under the statute (2 R. S. 98 §§ 82, 83) where the assets sufficiently exceed known claims, but the legatee must give security to refund if deficiency results. If the legatee is a minor, the general guardian receiving the payment, must in addition to such security which is for the benefit of other persons interested in the estate, give security to the minor under 2 R. S. 91 § 47, for the faithful application of the money, etc., unless the security already given by the general guardian was fixed in view of the minor's interest in the legacy. *Ib.*

APPEAL.

Failure to appeal from void decree, not waiver of right to object to its enforcement by Surrogate's successor in office. See, JURISDICTION, 15.

ASSESSMENTS.

When not to be deducted from income. See, INCOME, 2.

ASSETS.

1. Shortly before his death, the decedent hired premises for three years, by parole agreement, a lease being drawn up, but not signed; and he entered and made valuable improvements. *Held*, That the lease being enforceable in equity, should be deemed an asset, for the whole term. *Green v. Green*, 408.
2. An administrator who renews or continues, in his own name, a lease held by the decedent, may be required to account for its full value as an asset, but, interest should be charged on such value only after the expiration of eighteen months from the issue of letters. *Id.*

ATTESTATION CLAUSE.

See, WILLS, 2.

BEQUEST.

See, LEGACY.

BOND.

See, SECURITY FOR DUE ADMINISTRATION OF ESTATE.

BURDEN OF PROOF.

To show advancement or ademption of legacy. See, ADVANCEMENT, 1.
To show fraud and undue influence in regard to a will made by a patient in favor of his physician. See, FRAUD AND UNDUE INFLUENCE, 2, 6.

CASES OVERRULED, DOUBTED, DISAPPROVED, EXPLAINED OR CRITICISED.

Matter of Walsh, Tucker, 132, as to proof of handwriting when testator makes his mark, disapproved. *Simpson's Will*, 29.
McLoskey v. Reid, 4. Bradf. 344, as to power of Surrogate to appoint guardian of minor, residing in another State, limited. *Matter of Horsford*, 168.

- Sanford v. Sanford*, 43 N. Y. 723, as to what is necessary to constitute a gift *inter vivos*, questioned. Matter of Ward, 251.
Shumway v. Cooper, 16 Barb. 556, as to power of executor or administrator, to call his co-executor or administrator to account, explained and limited. Matter of Ritch, 330.

CHARITABLE BEQUESTS.

Construction of Act of 1860, c. 360, in regard to. See, DEVISE, 3.

COLLECTOR.

1. After citations have been issued on a petition for the probate of a will, the Surrogate may appoint a collector or special administrator upon petition of one intending to contest the will, showing that the contest will be such as to cause delay. *Crandall v. Shaw*, 100.
2. Under section 23 of the act of 1837, (3. R. S. 6 ed. 79 § 41), the Surrogate has power to make such appointment in anticipation of a delay which is necessarily to ensue. *Ib.*
3. Under section 11, of L. 1864, c. 71, which is still in force, notwithstanding L. 1867, c. 782, § 7, after the executor or other persons interested in a will have appeared before the Surrogate—a *g.*—by making application to him for probate,—ten days notice must be given them of any application to appoint a collector or special administrator. *Ib.*
4. An appointment made without such notice must be vacated on application; but the collector having acted in good faith may be allowed his compensation and expenses. *Ib.*
5. An executor or other person who is a party to the litigation should not be appointed collector. *Ib.*

COMMISSIONS.

1. Annual rests, and full commissions thereon, are now allowed, not only as formerly, when such rests are made by order of the court for the purpose of charging the executor or administrator with interest, but also in all cases where an actual annual accounting before the Surrogate is had, under the requirements of a rule of court or a statute. *Cram v. Cram*, 244.
2. But full commissions cannot be allowed on the voluntary rendering of an account for the purpose of securing full commissions. *Ib.*
3. On an accounting by testamentary trustees, their commissions, when allowed, are at the rate of 5, 2½ and 1 per cent., although the like rates were previously allowed to them on accountings as executors. *Ib.*
4. Under 2 R. S., 86, § 23, which forbids an executor neglecting to join in making an inventory, to interfere thereafter with the estate,—and 2 R. S., 93, § 58, which makes the compensation of an executor dependent on the sums received and paid out,—no commissions can be al

- lowed to an executor who refused to join in the inventory because it was untruthful, and thereafter took no part in the administration. *Eager v. Roberts*, 247.
5. The act of 1863, which authorizes the allowance of separate commissions to several executors where the estate exceeds \$100,000,—does not apply in favor of an executor who has not filed an inventory nor performed any duty. *Ib.*
 6. Such an executor, if he has no interest in any unsatisfied bequest, has no standing in court to object to the correctness of the account of his co-executors. *Ib.*
 7. Where the same persons are made both executors and trustees under the same will, such of them as decline to unite in the inventory and do not act as executors, are not entitled to executor's commissions, though they duly qualified, but they are entitled, on serving as trustees, to commissions on the sum which comes to their hands as such and also on the income. *Matter of Pike*, 255.
 8. Where there are more than three co-executors, administrators or trustees, entitled to commissions under the Acts of 1863 and 1866, the Surrogate cannot apportion the commissions according to their respective services, but must divide them equally. *Ib.*
 9. The will appointed four persons executors and testamentary trustees, and one qualified, as executor, and took sole charge of the estate, The others afterward qualified, but did not act. On the final and last accounting of the acting executor, the fund passing to the four trustees was over \$100,000.
 - Held*, 1. That only the acting executor was entitled to executor's commissions.
 2. That all the four were entitled to commissions as trustees.
 3. That the total commissions of the trustees were a sum equal to three executors' commissions, and were to be divided equally between the four. *Ib.*
 10. Full commissions are not allowable to trustees on an accounting merely because, without the order of court or requirement of statute, rests have been made for the purpose of charging the trustee with interest. *Tucker v. McDermott*, 312.
 11. Where three commissions are to be divided among more than three executors, under the act of 1863, no discrimination can be made among them, although one of them performed most of the labor. *Bohde v. Brunner*, 333.
 12. The mere fact that the executors' retention of irregular securities has caused loss to the estate, is not ground for refusing them commissions. *Gillespie v. Brooks*, 349.
 13. Executors, administrators, or trustees, charged with loss resulting from their neglect to make regular investments of a fund, are entitled to commissions on the amount so charged. *Matter of Mount*, 405.
 14. Executors, and administrators are entitled to commissions on a debt due to themselves from the decedent, and presented and allowed on their accounting. *Ib.*

15. Where a will gives a specified sum on trust for the life of a beneficiary, with remainder over to another, the commissions for paying income to the beneficiary for life are properly chargeable to the body of the estate, in the absence of any indication in the will that the commissions were to be charged on the income. *Ib.*
16. The executor does not waive his right to commissions on the income, by paying it over in full to the beneficiary for life. *Ib.*
17. Executors and administrators are not entitled to appropriate to themselves from the funds of the estate, the commissions allowed by law, until the same have been awarded to them by the Surrogate on an accounting. *Wheelwright v. Wheelwright*, 501.
18. It seems that they may properly be charged with interest on sums so appropriated which otherwise would have produced interest to the estate. *Ib.*
19. They are not bound to part with possession or control of funds necessary to meet their commissions, until their claim to commissions has been determined by the Surrogate. *Ib.*

COMPROMISE OF CLAIMS.

1. Executors or administrators who, without a Surrogate's order, compound debts due the estate which were inventoried as worthless, are not chargeable with more than they have collected, unless there is evidence of bad faith or serious error of judgment. *Gillespie v. Brooks*, 349.
2. They have power to compound claims, independent of the statute which gives additional protection when they act under leave of the Surrogate. *Ib.*
3. The statute empowering the Surrogate to authorise executors and administrators to compromise or compound debts,—does not sanction their entering into a composition deed, giving debtors to the estate a long credit without part payment. *Matter of Loper*, 545.

CONSTRUCTION OF WILL.

1. The testator, after making provision for a married daughter, directed that in case there should be other children of his living at his death, a specified sum which he had advanced to the married daughter be deducted, with interest, and with any other moneys which he might advance after a specified date, adding in parenthesis (also the further sum of \$86,000). He made the husband of the daughter an executor. It appeared that the testator had informed the draftsman of his will that the \$86,000 represented claims which the testator held against the son-in-law.
- Held*, (1) That parol evidence of that statement was admissible to enable the court to construe the clause. (2) That although there was no direct gift to the executor, there was sufficient indication of testator's

intent that the claim against him, if enforced at all, should be enforced by deducting it from his wife's bequest, so as to exonerate the executor in omitting the claim from the inventory, and from being charged therefor as for an asset. *Stevens v. Stevens*, 265.

2. In determining whether the will effectively appoints a person named as executor, the intention of the testator must be discovered from the words of the will, if plain and obvious, and not from extraneous circumstances; and the court must proceed upon known principles and established rules, not loose, conjectural interpretation, nor by considering what a man may be imagined to do in the testator's circumstances. *Fosdick v. Delafield*, 392.
3. Where the words of the will are plain, the intent always follows. The will cannot be added to nor its omissions supplied. *Ib.*
4. The court cannot give effect to the will contrary to the plain and obvious import of the terms used, upon mere conjecture as to testator's intentions, nor upon suspicion that he did not understand the terms used, even though adopting the plain and obvious import will defeat the provisions. *Ib.*
5. Where the testator has used plain and proper language to express his intention, and there are no ambiguities, nor any other provisions of the will inconsistent with the language used, the court cannot look outside of the terms of the will for the expression of the testator's intention. Much less can the court assume to conjecture what he intended, independent of the language, or base a construction upon its notion of what ought to have been his intention. *Ib.*
6. The will, after naming two brothers of the testatrix as executors, added "and in case both of my said brothers herein lastly above named shall depart this life prior to my decease, or in case they shall both decline to act as such executors, then I hereby nominate and appoint,"—here naming a son of each of the brothers. Both brothers survived the testatrix. One declined to act. The other qualified as executor, and both subsequently died. *Held*, That there being nothing in the will to evince a controlling intention to keep the administration in the family, the court could not, on extrinsic evidence that both testatrix's brothers were advanced in age at the time the will was made, disregard the words "prior to my decease," and grant letters to a son of one of the brothers. Such words constitute a condition. *Ib.*

DECREE.

What words will by implication make an executor also a trustee. See, TRUSTEE.

COSTS.

1. The power of the Surrogate to award costs does not authorise him, on an accounting of an administrator, appointed in a case of intestacy,

to award costs of the counsel for proponents of a will which had been refused probate. *Matter of Gates*, 144.

2. The Surrogate cannot award costs to any person not a party before him. *Ib.*
3. If the Surrogate makes such allowances, even by consent of counsel, and they are paid by the executor or administrator they must nevertheless be stricken out, if objected to on his final accounting. *Ib.*

DEATH.

Presumption of, from disappearance and absence unaccounted for. See, EVIDENCE, 4.

DEBTS.

See, PAYMENTS OF DEBTS.

DECREE.

1. Where a petition shows a case conferring jurisdiction upon a Surrogate, he has authority to act in the premises; and a subsequent discovery of persons interested, who were entitled to, but did not have notice, because their existence was denied by the petition, does not render his decree void. At most it would only render it inoperative as to their interest. *Bailey v. Stewart*.
2. A Surrogate's decree having been adjudged void, by the Supreme Court, it is superfluous for the Surrogate to vacate it. *Matter of Espte*, 445.

DEFAULT.

On what grounds opened. See, PRACTICE AND PLEADING, 4, 5.

DELUSION.

Evidence of, sufficient to avoid will. See, MENTAL CAPACITY, 2, 3, 4, 5, 6, 7, 8, 9.

DEVISE.

1. A devise to the trustees of an incorporated college, and their successors forever in trust, etc., *Held*, To vest the estate devised in the college as a corporation. *Curran v. Sears*, 526.
2. A devise to an incorporated college for its legitimate purposes, subject to the payment of an annuity by the devisee to the testator's widow for life. *Held*, Valid. In this respect, there is no distinction between a devise of realty and a bequest of personalty. *Ib.*
3. The act of 1860, (Laws of 1860, chap. 360)—prohibiting bequests, etc., to charitable, literary, etc., institutions of more than one-half of tes-

tator's estate—construed and applied. And *Held*, that the Surrogate will not undertake, by reference or otherwise, to ascertain the amount of the devise, until the party interested in the disputed devise is brought in, and in the meantime probate will be suspended. *Ib.*

DISTRIBUTION.

1. A gift to testator's wife made, and by her accepted, in lieu of dower, does not preclude her claim to share in a surplus of personalty undisposed of by the will. *Edsall v. Waterbury*, 48.
 2. The fact that the surplus is only a remainder after the termination of a life estate, given to the widow herself, does not alter the case. The right to the shares in remainder undisposed of by the will vests on the testator's death, in the widow and next of kin, by force of the statute of distributions, although such shares are not payable till her death, when her share will be payable to her personal representatives, or next of kin. *Ib.*
 3. The decedent's husband, by a former wife, had one daughter, G., who died before her mother, leaving children. The decedent died leaving sisters, but no husband, parent or child. *Held* that the decedent's sisters were her only next of kin. The children of G. cannot participate in the distribution of the estate, because they are in no way related to the decedent. Relationship is the ground on which the law of distribution is based. *Garlay v. Cornwall*, 139.
- Decree for, not made without petition for final accounting.* See ACCOUNTING, 6
- Surrogate cannot order distributive share to be paid to assignee of next of kin.* See JURISDICTION, 3, 4, 5.
- Power of Surrogate to reserve from distribution sum sufficient to satisfy claim against estate in litigation.* See, JURISDICTION, 7, 8.

DIVORCE.

Granted by court of another State, when it may be impeached here by evidence that it was obtained by fraud or perjury. See, MARRIAGE, 1.

DONATIO INTER VIVOS.

1. Evidence that the intestate gave to his wife money with which to purchase furniture, which she did, without further evidence tending to show a gift either of the money or furniture to her as her separate property, is not enough to exonerate her from accounting for it as administratrix. *Matter of Ward*, 251.
2. A savings bank deposit by the intestate in the name of himself and wife, entered thus, "Richard or Kate Ward," she never having had possession of the pass-book during his life, is presumptively his property exclusively. *Ib.*

3. The essential features of a gift *inter vivos* are expressions of intention to make a gift, and an actual delivery of the subject of it to the donee. *Ib.*
4. To constitute a gift *inter vivos* there must be an expression of intention to make a gift, and an actual delivery to the donee. *Stevens v. Stevens*, 265.
5. The testator, while living, subscribed to shares in an Opera House corporation, and took the certificates in his own name; but the ticket issued to him for the box represented by his shares, he delivered to his wife. He said he purchased the box for her, and that she needed no other evidence of ownership than the tickets. She enjoyed the use of the box, and he allowed her to rent it and receive the rent for her own use. *Held*, that this did not establish a gift of the shares to her; that she occupied by his license, and for occupancy after his death, his executors might charge her rent. *Ib.*
6. A husband whose wife was going abroad with their daughter provided her with circular notes in the nature of a commercial or traveler's credit for their expenses and purchases. He died while they were abroad. *Held*, that so much of the credit as was used for expenditures while abroad, and returning on hearing of his death, could not be charged to her by the executors, but she was chargeable with notes collected by her bankers after her return. *Ib.*

DOWER.

1. An absolute direction in the will to sell real property, since it affects an equitable conversion from the time of testator's death, is inconsistent with a right of dower in the widow; and she should be put to her election, whether to take a share of the proceeds of conversion or to claim dower. *Brink v. Layton*, 79.
2. An agreement between the beneficiaries under a will to hold and treat the real estate as such, notwithstanding an equitable conversion effected by an absolute direction in the will to sell it, cannot affect the right of succession of the heirs of the beneficiaries nor the dower right of a wife married to a beneficiary before the agreement was made. *Ib.*

EQUITABLE CONVERSION.

See, DOWER, 1, 2.

EVIDENCE.

1. On the question whether the administrator was negligent in leaving testator's deposit in a savings bank, after the bank had suffered from "a run" until it finally became insolvent;—*Held*, That testimony of wit-

- nesses as to distrust expressed by depositors and others, was sufficient to establish such general reputation for unsoundness as would raise a presumption of knowledge of its unsound condition on the part of the administrator, where all the witnesses who knew of its reputation and course of business, testified that they had confidence in it up to the time of its failure. *Sheerin v. Public Administrator*, 421.
2. Section 399 of the Code of Procedure, excluding the testimony of a party, etc., to a personal transaction or communication between him and a person deceased, in certain cases, does not preclude a party from testifying that he overheard a conversation with the deceased, in which the witness did not participate. *Marsh v. Gilbert*, 465.
 3. An objection to the exclusion of a question on the examination of an executor or administrator, on his accounting, should not be sustained, if the materiality of the question does not appear, by connection with the point in issue. *Ib.*
 4. An annuitant sixty-six years of age, who had been accustomed to call on the executor regularly and frequently for his money, on which he was dependent for support, left his abode in May, without indicating an intent of remaining absent, and was never after heard from. During the same month he had called and received about half a year's income. His physician testified that at the time when he disappeared he was suffering from incurable disease, under which he could not have survived more than three months. *Held*, that these facts were sufficient to sustain a finding that his death during the fall of the same year might be presumed. *Matter of Ackerman*, 521.
- TO AVOID PRESUMPTION OF ADVANCEMENT. See ADVANCEMENT, 6.
- Circumstantial. to show a DONATIO INTER VIVOS.* See DONATIO INTER VIVOS.
- Previous wills made by testator, admissible as evidence of undue influence.* See FRAUD AND UNDUE INFLUENCE, 1.
- Circumstantial to prove undue influence and fraud.* See FRAUD AND UNDUE INFLUENCE, 1, 2, 3, 4, 5, 6.
- Of marriage from co-habitation, declarations and repute.* See MARRIAGE, 6, 7, 8.
- Of want of mental capacity to make will.* See MENTAL CAPACITY.

EXECUTION (LEAVE TO ISSUE).

1. In computing the amount of assets in the hands of the executor or administrator, when a judgment creditor applies for leave to issue execution, the claim of the attorney or counsel of the executor or administrator, for professional services rendered to him, and not upon the retainer of the deceased, in the unsuccessful defence of the applicant's judgment, cannot be deducted. *Field v. Field*, 160.
2. If an executor or administrator has rendered an account showing assets applicable to the payment of a judgment, the judgment cred-

itor, on petitioning for leave to issue execution, need not cite him to account. *Smith v. Howell*, 325.

3. If the assets have been materially reduced since the account was rendered it is for the executor or administrator to show the fact, distinctly, in answer to the petition. A mere allegation that the amount of *cash* appearing in the account has been reduced by payments, is not enough. *Ib.*
4. It *seems* that if the account has been finally settled, the Surrogate's leave is not necessary before issuing execution. *Ib.*
5. The Surrogate should not refuse leave to issue execution because an appeal by the executor or administrator is pending, unless the necessary security to stay proceedings has been given. *Ib.*
6. When a sufficiency of assets clearly appears, it is the duty of the Surrogate to allow execution to issue. *Ib.*

EXECUTION OF WILLS.

See WILL, 1, 2, 3, 5, 6, 7.

EXECUTORS AND ADMINISTRATORS.

1. An executor or administrator cannot be allowed for expenditures incurred after the decedent's death in stocking or carrying on a farm left by the decedent, or in operating a mill owned by himself and the decedent as tenants in common, in the absence of clear evidence that the expenditures were beneficial to the estate. *Larroux v. Larroux*, 69.
2. In such a case, expenditures not necessary in the proper administration of the estate, or, in execution of specific powers in the will, should be disallowed: and, on the other hand, credits of moneys not proceeding legitimately from the assets or estate, should be stricken out. *Ib.*
3. But charges for threshing grain if done to prepare for sale, or market, grain raised by the decedent, are proper; so of taxes assessed against him in his life-time. *Ib.*
4. The decedent was one of a number of heirs and beneficiaries under a will who, in her life-time, had agreed upon a settlement of their interest in their ancestor's estate, pursuant to which a bond and mortgage had been taken by the decedent in her own name, but in fact for the benefit of another beneficiary whose share was thus invested. *Held*, that the fund was properly paid over to the latter by the administrator of the former. *Brink v. Layton*, 79.
5. Such a settlement must be as binding upon one of the parties to it as upon the others; and the transaction having been in an individual capacity, any mistake must be corrected by action, and not on the accounting in the Surrogate's court. *Ib.*
6. Where the administrator in good faith paid a claim of \$300 for services to the decedent, which was presented verified in the usual form, and

the evidence before the auditor tended to substantiate it:—*Held*, that it must be allowed. *Ib.*

7. An administrator cannot be allowed a payment of interest on a Mortgage of real property, made by the decedent, without proof that the premises did not descend to the heir, etc. *Cornwell v. Deck*, 87.
8. Premiums paid for insurance effected by an administrator, on personal assets, may be allowed to the administrator. *Ib.*
9. Premiums on such insurance of real property cannot be allowed, unless the insurance was effected under the belief that the estate was insolvent. *Ib.*
10. Expenditures for repairs to real property, and taxes levied subsequent to the decedent's death, and exclusively for the benefit of the real property, cannot be allowed. *Ib.*
11. The expense of a tomb-stone, if not excessive, must be allowed in full, although the estate be insolvent. *Ib.*
12. Where the decedent was a merchant, and left a stock of goods in the retail store carried on by him,—*held*, that it was a fair exercise of discretion, by the administratrix, to employ a clerk to continue the sale at retail, instead of making a forced sale; and there being no proof of loss to the estate, the wages of the clerk must be allowed. *Ib.*
13. Executors cannot be allowed for expenditures made by them for a purpose not authorised by the will or the legal duty of executors,—e. g., to maintain a favorite horse of the testator, as long as he should live, although made by them in consequence of the verbal request of the testator. *Matter of Teyn*, 306.
14. Testator left a daughter aged four, appointing his executors her guardians, in case his widow married again; some years after his death, the widow married again, and the child thereafter resided with the stepfather. *Held*, that the executors could not be allowed their payment to the stepfather for the ward's board and maintenance without proof of an agreement made by them to pay therefor. *Ib.*
15. If such an agreement were found, the law, (in the absence of a different stipulation), would imply an agreement to pay yearly; and the statute of limitations would begin to run as to each year's board, etc., from the end of the year. *Ib.*
16. Under a will which directs the executors to convert into money the personalty not securely invested, and invest and keep it invested on bond and mortgage or public stocks,—they have not authority to loan on mere personal security, and at less than the lawful rate of interest. *Bohde v. Bruner*, 333.
17. It is not an insuperable objection to allowing a gross sum for disbursements made by the executor in managing the estate for a series of years, that he is not able to give in detail all the various items of charge. *Ib.*
18. The executor may be allowed for clerk hire necessarily incurred in the administration of the estate. *Ib.*

20. An unquestioned charge in the executor's account, for services rendered in settlement of the estate by the clerks of a firm of which the executor is a member, may be allowed to the executor, on condition of his producing the receipt of the firm. *Ib.*
21. Debts due the decedent to a large amount were inventoried as worthless, and the executors, under the advice of the decedent's bookkeeper who was familiar with the circumstances, did not attempt to collect them by suit. *Held*, that they were not chargeable with such debts, in absence of evidence that the debts might have been collected. *Gillespie v. Brooks*, 349.
22. Executors are not bound to require vouchers from creditors whose claims are attested by the decedent's books of account and by personal information of their correctness from his bookkeeper. *Ib.*
23. So information from the widow that a certain sum due from the decedent to a servant, is sufficient to justify the executor in making payment without a voucher. *Ib.*
24. The object of the statute (2 R. S. 126 § 36,) requiring the public administrator to deposit all moneys by him "collected and received," within two days after the receipt thereof in an officially designated bank, is to secure the funds against loss by conversion by the administrator, or his indiscreet selection of a bank. *Sheerin v. Public Administrator*, 421.
25. A bank deposit made by the decedent, whose book only comes to the hands of the administrator, is not money "collected and received," by him, within the meaning of the statute. *Ib.*
26. An administrator is bound to use such care and diligence as a business man would exert in the management of his own property. He is not liable for a loss occurring notwithstanding such care. *Ib.*
27. An executor who, at the time of the making of the will, resided within the jurisdiction, and removes therefrom after undertaking the duties of the office, is not entitled to charge, in his accounts, his traveling expenses in visiting the place of jurisdiction on the business of the estate. *Marsh v. Gilbert*, 465.

Executor of executor, no right to administer estate. See ADMINISTRATION, 1, 2.

Power of, to compromise claims due estate. See COMPROMISE OF CLAIMS.

What words in will sufficient to appoint one as executor. See CONSTRUCTION OF WILL, 2, 3, 4, 5, 6.

Executor should not be appointed collector. See COLLECTOR, 5..

EXEMPT PROPERTY..

1. On the accounting of an administratrix she cannot be allowed for the articles which she might, as widow, have claimed to be exempt by law in her favor, on making the inventory, if they were not so allowed; especially where there is evidence tending to show that she had possession of assets not inventoried. *Cornwell v. Deck*, 87..

2. If the claim of exemption at the proper time, was omitted, through ignorance or mistake, the remedy is a special application to correct it, on notice to the creditors and next of kin. *Ib.*

EXPENDITURES.

As to what expenditures made by executors or administrators will be allowed
See EXECUTORS AND ADMINISTRATORS, 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20.

FRAUD AND UNDUE INFLUENCE.

1. Previous wills made by a testator are admissible on the question of undue influence, as showing that the testator was easily influenced by those who had his confidence, or that he was under the influence of a delusion. *Colhoun v. Jones*, 34.
2. A will made by a patient in favor of his physician, in whose house he resides, and under whose care he was to the time of his death, is presumptively open to the imputation of undue influence. The burden of proof is upon the latter, to show the contrary. *Ib.*
3. Fraud and undue influence may be inferred by circumstances. *Ib.*
4. Undue influence, vitiating a testamentary provision, may be proved by circumstantial evidence. *Baker's Will*, 179.
5. Upon a husband's application for probate of his wife's will, containing a bequest of a life estate to him, it appeared that he had been formerly married to another woman, against whom he had procured a divorce, by fraud and perjury, and that by fraudulently representing that he was thereby made free to marry again, he had induced the decedent to marry him, secretly, and that while she was his wife she had made the bequest in his favor, now in question. *Held*, that these circumstances were sufficient evidence of undue influence to avoid the bequest. *Ib.*
6. It seems, that the burden of proof as to undue influence in the case of parties standing in a relation of trust and confidence, is upon the beneficiary. *Ib.*
7. To constitute undue influence which will invalidate a testamentary act, there must be the control of another will, over that of the testator. *Burk's Will*, 239.
8. Where the testatrix insisted on inserting in her will bequests to the draftsman's children, notwithstanding his suggestion that they had no claim, and made no provision for her husband, and none for her own son until asked by a by-stander if she would not,—*Held*, that as she had long been separated from her husband, and her son had been long absent and unheard from, the circumstances did not show impaired mind and subjection to undue influence. *Ib.*
9. To prove undue influence by duress or threats which will avoid a will, it is not necessary to show that the duress was visible or physically

exercised at the moment of the execution. It is enough to satisfy the mind of the court or jury, that the duress existed shortly before, and continued its domination over the mind at the time of its execution. *Fagan v. Dugan*, 341.

10. Such influence is usually effected by slow, adroit and covert process, manifested by numerous acts, each of which is trifling in itself, but all of which combined are potential and controlling; and it is the province of the court, from the evidence, to group and aggregate the several acts and circumstances with the opportunity and results, for the purpose of determining their effect on the testator's mind. *Ib.*
11. Undue influence to avoid a will, must be such as to deprive the testator at the time, of the free exercise of his will; and must be exercised in respect to the very act. And the fact must be proved; it will not be inferred from opportunity and interest. *Wade v. Holbrook*, 378. See also WILLS, 4.

FRAUDULENT CONVEYANCES.

When Surrogate on accounting may compel an executor to account for property conveyed to him by the decedent in fraud of creditors. See JURISDICTION, 2, 3.

GIFT.

What words in will sufficient to show intention to make gift to executor of claim due from him. See CONSTRUCTION OF WILL, 1.

For cases in relation to gifts inter vivos. See DONATIO INTER VIVOS.

GUARDIAN AND WARD.

1. A widow judicially appointed guardian of her own children may be removed, upon her re-marriage. *Swartwout v. Swartwout*, 52.
2. *It seems* that the re-marriage terminates such a guardianship. *Ib.*
3. Where the widow was a co-executrix, and had assented to improper expenditures, but was also guardian for minor heirs and next of kin, and had not expressly assented in that capacity—*held*, that though she could not, as executrix, object to their allowance to her co-executor, she could do so as guardian. *Larroux v. Larroux*, 69.
4. In such case, the Surrogate should appoint a special guardian for the purposes of the accounting. *Ib.*
5. Where such expenditures exhausted the personalty before the debts were fully paid, and necessitated a sale of realty to pay debts—*held*, that they could not be treated as payments made to the guardian. *Ib.*
6. The Surrogate has not, by the statutes of this state, jurisdiction to appoint a guardian of the person and estate of a minor resident in another state of the Union, even if having property here. *Matter of Horsford*, 138.

7. The remedy is for a guardian appointed in such other state, to proceed by taking out letters here, under L. 1870, c. 59; 1875, c. 442. *Ib.*
 8. Whether the Surrogate has such jurisdiction in case of a minor resident in a foreign country,—*query?* *Ib.*
 9. A conservator or committee of a lunatic minor, appointed in another state, is not entitled in the Surrogates' courts, to call a guardian of the minor in this state to account for, and pay over to him, the estate of the minor in his hands. The remedy is by application to the Supreme Court. *Matter of Traznier*, 171.
 10. The "incompetency" for which a Surrogate may remove a guardian under 2 *Rev. Stat.* 152, § 14, has relation not merely to the mental condition and moral status of the guardian, but the court may take into consideration the relative, social and pecuniary position of the guardian and the infant, as affecting the interests of the latter in respect of nurture, care, education and safety. *Damarell v. Walker*, 198.
 11. The Surrogate has power to remove a testamentary guardian on grounds which will warrant the removal of a general guardian. *Ib.*
 12. The fact that a will by which a guardian is appointed for an infant child of the testator, had been admitted to probate, there having been no contest on the question of testamentary capacity, will not preclude the court from passing upon the question of the testator's mental condition, on a subsequent application to remove the guardian. *Ib.*
 13. Previous insanity of testamentary guardian,—how far a ground for removal. *Ib.*
 14. Guardians cannot be justified by the consent of the ward, given during minority, in investing the ward's funds in their own business. *Matter of Teyn*, 306.
 15. But the propriety of such investment should not be passed upon, on an accounting of the guardians, as executors; but should be raised on a decree requiring them to pay over the fund. *Ib.*
 16. The guardian of an infant has no power to give the consent required by the statute, for the distribution, in kind, of unsold assets unless authorized by a competent tribunal. *Carman v. Cowles*, 414.
 17. The Surrogate's Court has not power to grant such authority where the guardian is one appointed by another court. *Ib.*
 18. The court will not require the proceeds of a trust fund to be paid to the parent of minor beneficiaries, for their support, without requiring security from him as guardian, even where he is unable to give such security. *Savage v. Olmstead*, 478.
 19. A guardian who invests the funds of his ward on personal securities, assumes the risk of loss hereby. *Torry v. Frazer*, 486.
 20. He must also bear the expenses of litigation in efforts to collect funds so invested. *Ib.*
- When annual rests allowed to guardian on computing his commissions. See COMMISSIONS*, 20, 21.

HUSBAND AND WIFE.

1. The married women's acts of 1848, etc., did not change the obligation of the husband to support the wife; nor charge the wife with her own support, except in cases where she makes herself and her separate estate liable. *Webber v. Spannhake*, 258.
2. If a husband calls a physician to attend his wife, and the physician not knowing she has a separate estate, attends without intending to make any charge, the subsequent discovery of the fact that she had such estate will not enable him to claim payment from her estate. *Id.*
Administrator of deceased husband whose wife died before him not entitled to administer estate of wife. See ADMINISTRATION, 4.

INCOME.

1. Expenditures incurred for the benefit of the body of the estate, such as expenses of unproductive property, and for extinguishing a claim of dower,—*Held*, not chargeable against income. *Cram v. Cram*, 244.
2. Under a bequest of "the income" of real estate "after payment of taxes," assessments are not to be deducted from the income. *Bohde v. Bruner*, 333.
When commissions not deducted from. See COMMISSIONS, 15, 16.

INFANTS.

1. Where infants are concerned, the court will interfere to correct an error prejudicial to them, though acquiesced in by their special guardian and counsel. *Tucker v. McDermott*, 312.
When objections to account on behalf of not waived by not being taken before close of evidence. See ACCOUNTING, 5.

INSURANCE.

When not chargeable to Life Tenant. See LIFE TENANT, 1.

INTEREST.

1. A direction in the will that a legacy is to be paid "as soon as conveniently may be after my decease," does not entitle it to draw interest from a time before the expiration of a year after the issue of letters. *Rogers v. Rogers*, 24.
2. Where there is no sufficient direction to pay the legacy before the year expires, the indication of an intent to allow interest before that time must be clear, or it cannot be allowed. *Id.*
3. Compound interest should only be charged in case of gross delinquency or intentional violation of duty. *Tucker v. McDermott*, 312.
4. General legacies, in their nature, carry interest. *Lynch v. Mahoney*, 434.

5. Such interest is computed from the time at which the principal is actually due and payable. *Ib.*
6. The executor is allowed by law one year to prepare for payment, and interest runs from the expiration of the year, unless another period is fixed by the will. *Ib.*
7. But on a legacy declared to be in satisfaction of a debt, or, in some cases, for the maintenance of a child, interest is allowed from testator's death. *Ib.*
8. A bequest of interest upon a fund bequeathed in trust, to be invested though payable to a person neither an infant nor a widow, is subject to the rule applicable to an annuity, and the interest runs from the date of testator's death. *Ib.*
9. Where the sole assets of a testator consist of an estate in remainder which does not fall in until some years after the testator's death, interest on legacies under his will is allowable only from the time such assets come into the executor's hands by the death of the life tenant, and not from a year after testator's death. *Wheeler v. Ruthven*, 491.
10. The rule as to a reduced rate of interest on legacies where less than the full rate has been realized, applies only as between the executor and the estate; not as between the legatee and the estate. *Ib.*

When chargeable to executor or administrator on funds retained by them as commissions before commissions have been awarded to them by Surrogate. See COMMISSIONS, 17, 18.

If allowed against executor or administrator on accounting, from what time chargeable. See ASSETS, 2.

INVENTORY.

1. An executor who is obstructed by his co-executors in the performance of his duty to make a true inventory, should take proceedings to enforce the making of it. *Eager v. Roberts*, 247.
2. The fact that a bank deposit was inventoried as cash, does not conclude the administrator and throw upon him absolute responsibility for the security of the fund. *Sheerin v. Public Administrator*, 421.
3. The inventory may be shown to be incorrect, on a final accounting. *Ib.*

Effect on his commissions of failure by an executor to file. See COMMISSIONS, 4.

What words in will show intention to release claim against executor, sufficient to justify him in omitting it from inventory. See CONSTRUCTION OF WILL, 1:

JURISDICTION.

1. The Surrogate has power to adjudicate upon all questions arising from acts committed by executors, administrators, or guardians who are subject to his jurisdiction. *Matter of Adams*, 66.

2. He may, upon an accounting, compel the executor or administrator to account for property transferred to him by the decedent while living, in fraud of his creditors. *Ib.*
3. The decedent, in his life-time, transferred a bond and mortgage to a third person, who transferred it to the decedent's wife, in fraud of his creditors, and died, leaving a will appointing her executrix with other executors. The bond and mortgage was not entered in the inventory, because he had parted with the title to it. *Held*, that on final settlement of the accounts, the Surrogate had power to compel the executrix to account for the value. *Ib.*
4. Under the provisions of the *Revised Statutes* (2 R. S., 95, § 71) directing that "upon the rendition and final settlement of the account of an executor or administrator, when it appears that any part of the estate remains to be paid or distributed, the Surrogate shall make a decree for the distribution thereof, among the * * * next of kin to the deceased, * * * and in such decree shall settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive share; to whom the same shall be payable; and the sum to be paid to each person," the Surrogate has no jurisdiction to determine the rights of two persons, each claiming a right to be paid a distributive share by virtue of an assignment or other transfer from one of the next of kin. *Hitchcock v. Marshall*, 174.
5. Nor can the Surrogate exercise this power even upon the request of both the claimants. *Ib.*
6. The Surrogate cannot order payment of a distributive share to be made to an assignee thereof, even when there is no objection thereto. *Ib.*
7. The Surrogate has power to open, vacate, or modify, his probate of a will, whether of real, or personal estate, or both. *Bailey v. Stewart*, 212.
8. The Surrogate, although authorised by 2 R. S. 96, § 74., upon an accounting, to reserve from distribution a sum sufficient to satisfy a claim against the estate not due, or under litigation,—cannot reserve for anticipated costs of such litigation. *Field v. Field*, 160.
9. Only claims against the estate, not those against the executor or administrator, can be reserved for, under that section. *Ib.*
10. The rule that the Surrogate cannot determine disputed claims on an accounting, does not preclude him from determining a controversy as to whether a claim against an executor is discharged by the will. *Stevens v. Stevens*, 265.
11. The Surrogate has power, on proper cause shown, to remove an executor and guardian or one of several co-executors and guardians, if his circumstances are so precarious as not to afford adequate security for his due administration of the estate. *Senior v. Ackerman*, 302.
12. The fact that the testator knew the circumstances of the executor and guardian, is not a sufficient reason why the court should not exercise this power when necessary for the protection of the interests of beneficiaries under the will. *Ib.*

13. The Surrogate may, of his own motion, compel testamentary trustees to render an account. *Tucker v. McDermott*, 312.
 14. He has power to settle an account so rendered; and for that purpose, the Surrogate of the city and county of New York may refer it to an auditor or referee. *Ib.*
 15. The incidental powers of the Surrogate's Court are only such as are reasonably necessary to carry out the provisions of the statute, and such as may be inferred from its language to be necessary to accomplish its objects. *Carman v. Cowles*, 414.
 16. Omission to appeal from a Surrogate's order does not preclude the party from objecting, on the ground of want of jurisdiction, to its enforcement by the Surrogate's successor. *Savage v. Olmstead*, 478.
 17. The Surrogate should not enforce an order made by his predecessor on a subject of which he had not jurisdiction, even though it was for a time acquiesced in by the party. *Ib.*
 18. The authority of the Surrogate's Court over testamentary trustees is purely statutory. *Furniss v. Furniss*, 497.
 19. It has no power upon petition of a beneficiary, to compel trustees to complete an alleged purchase by them of the trust property. *Ib.*
 20. If such a purchase were proved upon a final accounting of the trustees, the Surrogate's court could compel the trustees to account for the price; but any remedy in the nature of a bill in equity to compel them to respond as if purchased, on the ground of their neglect, must be by action. *Ib.*
- Of Surrogate to open decree made on accounting on petition of one who has had no notice of such accounting.* See ACCOUNTING, 1, 2.
- To appoint collector.* See COLLECTOR, 1, 2, 3.
- To allow compounding of claims.* See COMPROMISE OF CLAIMS, 3. *To award costs.* See COSTS, 1, 2, 3.
- To allow guardian to consent to distribution in kind of unsold assets.* See GUARDIAN AND WARD, 17.
- To remove testamentary guardian.* See GUARDIAN AND WARD, 11, 12.
- On accounting by testamentary trustees to distribute undisposed of assets.* See TRUSTEES, 11, 12.
- On application to sell real estate to pass on claims presented against the estate by the heir or devisee and disputed by the executor or administrator.* See SALE OF REAL ESTATE, 1.
- To appoint guardian of non-resident minor.* See GUARDIAN AND WARD, 6, 7, 8.
- When decree not void though made on petition falsely alleging facts confessing jurisdiction to make the decree.* See DECREE, 1.
- For cases involving questions of the special jurisdiction conferred on the Surrogate of New York County.* See NEW YORK COUNTY.

LEASE.

By parol for more than one year, when assets of estate. See ASSETS, 1.

LEGACY.

1. Under a bequest of a "residue to be equally divided between my two sons" naming them, but adding, "should the two sons die before they become 21 years of age then" a gift over to others,—the gift to the sons is vested, subject only to be divested by the death of *both* sons before attaining majority. *Matter of Goodrich*, 45.
2. If one only should attain majority, the gift to the other would not lapse by his death in minority, but his share would go to his heir or next of kin. *Ib.*
3. A bequest of a fund, "part to the Bible Society, part to the Home of the Friendless, part to educate poor who wish to be evangelical ministers of the gospel, when they are thought to be qualified, and bid fair for usefulness, and for such religious purposes as the conference thinks best to appropriate it—" is void for uncertainty. *Ib.*
4. A gift of all testator's estate real and personal to "my daughter E., and my grandson W. (after the death of my wife), to have to their own proper use, share and share alike," vests on testator's death: and on the death of one of the legatees, before the death of the widow, his share goes to his next of kin. *Young v. Case*, 55.
5. Under a bequest to A. of the interest upon a fund, in case she shall become a widow, during her widowhood, payable annually,—continuing "and at her death, I gave \$500 of said principle sum to," etc., etc.,—*Held*, that the gift in remainder from the principal did not vest in interest till the death of the widow. *Booth v. Cornell*, 261.
6. After a legacy to a corporation "The New York Young Men's Christian Association" had vested in interest, but before the time for vesting in possession arrived, the corporation accepted a new charter under the name of "The Young Men's Christian Association" of New York which provided that on its acceptance, the former corporation should be dissolved, and all its property vested in the new corporation. *Held*, that the legacy lapsed, by the dissolution of the legatee, and the new corporation could not take it. *Ib.*
7. Testator bequeathed a fund to the "Five Points House of Industry,"—"to be applied to the uses of the farm in Westchester county." At the time of the testator's death the legatee had, and carried on such a farm, but before the time when the legacy could vest in interest, it ceased to have such farm. *Held*, that the words "to be applied," amounted to a condition, the failure of which defeated the legacy. *Ib.* But this ruling was reversed on appeal. SEE note at page 547.
8. A large house constructed and recently furnished for letting in apartments was set apart to a legatee as a part of the gift intended by the will, under an agreement that she should take the furniture "at a valuation." *Held*, under the circumstances, that the valuation should be as for the purpose of letting in the apartments, not for the purpose of removing and selling as second-hand furniture. *Stevens v. Stevens*, 265.

9. The agreement for such transfer provided that the legatee should receive the rents from a specified date. *Held*, that the legatee was entitled to be reimbursed by the estate a sum which she had to deduct from the rent collectable, by reason of a breach of the decedent's covenant, as to the condition of the premises in the lease he had given to a tenant. *Ib.*
 10. Where executors paid bills for repairs and household expenses dated after the testator's death, *Held*, upon the testimony of the widow that they were in fact incurred before his death, that they could not charge them to the widow. *Ib.*
 11. When real property of the decedent was set apart to the trustee of a legacy in fulfilment of a gift in the will, under an agreement that the legatee was to be responsible for repairs after a specified date. *Held*, that repairs made after that date, though ordered before it, were chargeable to the legatee. *Stevens v. Stevens*, 265.
 12. As a general rule legacies vest immediately on the testator's death, and words making them payable at a later time, do not prevent immediately vesting, unless an intent to postpone vesting is clearly manifested. *Talmadge v. Williamson*, 453.
 13. The will, after giving a life estate to the widow, added a direction that the executors divide the remainder, and all arrearages of income, etc., into parts, and pay and assign over one such part to each of certain legatees, the issue of any one dead, to take the portion the deceased parent would have taken. *Held*, that the gifts vested in interest on the testator's death. *Ib.*
 14. The fact that the gifts to females among them, should be free from the control of husbands, etc., did not alter the construction in this respect. *Ib.*
- When a certain sum is directed to be paid annually, when first payment is to be made.* See ANNUITY, 1.
- For cases in which and to what extent interest is allowed on legacies.* See INTEREST, 2, 3, 4, 5, 6, 7, 8.

LIFE TENANT.

1. Expenditures for insurances of property in which the widow had only a life estate, made by the executors, without her authority, and largely for the benefit of the ultimate estate,—*Held*, not chargeable by the executors to her. *Stevens v. Stevens*, 265.
- Commission of trustees not chargeable to, when.* See COMMISSIONS, 15, 16.

LIMITATION OF ACTIONS.

1. A suspension of the running of the statute of limitations is not confined to the cases specified in the statute, but may occur in other

cases of the disability of the creditor to prosecute. *Jennings v. Jones*, 95.

2. An heir who, by taking a fraudulent conveyance from his ancestor, in the ancestor's life time, has prevented creditors from proceeding to cause the land to be sold as the decedent's, until after the statute has run against their demands, cannot avail himself of the bar of the statute, to defeat such proceedings taken after they have procured the conveyance to be adjudged void. *Ib.*
3. Against a claim to compensation for personal services, rendered to the decedent during a number of years before his death, the statute of limitations will be deemed to have commenced to run from the completion of yearly or other periods of service, unless there is sufficient evidence of the decedent's agreement to make provision for the claimant's compensation by a disposition of his property at death. *Nicholl v. Larkin*, 236.
4. Evidence that the decedent in speaking of compensating the claimant, said to a third person that he "would not forget the claimant in case any thing happened to him,—in case of his death"—is not sufficient to support a finding of a referee, that the decedent agreed with the claimant to make compensation at his death. *Ib.*
5. Upon such evidence, with other evidence going only to show a general hiring by the year, the law implies an agreement to pay yearly, and the cause of action is deemed to have accrued at the expiration of each year. *Ib.*

When administrator not allowed for payment of debt barred by statutes of limitations. See PAYMENT OF DEBTS, 4.

MARRIAGE.

1. When a divorce, granted by a court of another State, is set up in the Surrogate's court here, as rendering legal a subsequent marriage on the validity of which the claim of a party depends, the divorce may be impeached by evidence that it was obtained by fraud and perjury. *Baker's Will*, 179.
2. The validity of a marriage is to be determined by the *lex loci contractus*. *Minor v. Jones*, 289.
3. But the law of the domicile of the deceased governs the distribution of his personal estate. *Ib.*
4. No particular form or ceremony is required by the law of this State, to constitute a valid marriage. *Ib.*
5. A marriage between slaves, contracted in a slave state, before the Emancipation, with the consent of their masters, and according to the custom of marriage among slaves, and in a manner which if contracted within this State would be a valid marriage here, must when drawn in question in the courts of this State, be adjudged a valid marriage. *Ib.*

6. For the purposes of establishing a right to administer, a marriage with the deceased may be proved by evidence of cohabitation, declarations, and repute. *Renholm v. The Public Administrator*, 456.
 7. Evidence of the declaration of the deceased that she was not married, is not necessarily inconsistent therewith, for it may have referred to ceremonial marriage. *Ib.*
 8. Nor is evidence that the deceased woman had deposited money in her maiden name, where she had previously been married to another. *Ib.*
- Of female guardian, when ground for removal.* See GUARDIAN AND WARD, 1, 2.

MENTAL CAPACITY.

1. In determining the testamentary condition of the testator's mind, the court will take into consideration the fact, though not controlling, that the will disinherits all the testator's relatives, and gives his estate to a stranger, with whom he had been acquainted but a few months. *Calhoun v. Jones*, 34.
2. Where it appeared that the testator's will was under the clear delusion, unfounded in fact, that his father and sister (his only heirs at law), hated him on the ground of a difference of religious belief, that his father had treated him harshly and had driven him from home, and had refused him the means of an education, and had wanted to get him out of the way, for the sake of his property,—*Held*, evidence of monomania, or insane delusion, it appearing that the will was the direct offspring of such delusion, or was affected by it. *Ib.*
3. Insane delusions on the part of the testator, as to any one of his relatives, are sufficient to avoid his will. *Shaw's Will*, 107.
4. Apart from dementia, or loss of mind, the test of insanity as disqualifying a testator, is mental delusion, affecting the testamentary disposition. If a person persistently believes supposed facts which have no existence, except in his perverted imagination, and are against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under an insane delusion. *Ib.*
5. If such delusions relate to persons who at the time would naturally have been the object of his testamentary bounty, and the court can see that the disposing provisions of the will were or may have been caused or affected by the delusions, the instrument is not his will and cannot be sustained. *Ib.*
6. The fact that a testator entertaining delusions, as to his relatives, gave them but \$11,000, and gave the residue, of about \$300,000, to his executors, in trust for such charitable purposes as they might determine, with an express clause of disinheritance, is cogent evidence of testamentary incapacity. *Ib.*
7. Evidence of delusions as to relatives is not countervailed by evidence of business capacity as to ordinary transactions. *Ib.*

8. If a testator, though having adequate business capacity, has the delusion that relatives for whom he would naturally provide are combining against him, or are impostors, or not related to him, or are his enemies or are trying to take advantage of him or get his property or injure him and he refuses to be reasoned out of the delusion and continues to believe in it against evidence and probabilities arising from their relationship, acquaintance and conduct, and the delusion is without foundation, in fact,—he is insane and his will cannot be sustained. *Ib.*
9. Evidence of the circumstances upon which an old man who had been the subject of delusions, was held also to have become incapacitated from all testamentary acts, whatever, by dementia. *Ib.*
10. The rule is well established that the testator must at the time of executing his will, have had sufficient capacity to comprehend the condition of his property, and his relation toward the persons who are, or might be, the objects of his bounties, and the scope and bearing of the provisions of his will. *Wade v. Holbrook*, 378.
11. Mere imbecility or weakness of mind, however, does not incapacitate, if there be sufficient understanding to satisfy the foregoing rule. *Ib.*
12. Intemperate habits, enfeebled condition and eccentricities do not disqualify a testator, unless his mind is so affected as to render him incapable of comprehending the condition of his property, or his relations to the persons who were, or should be the objects of his bounty, or the scope and bearing of the provisions of his will. *McLaughlin's Will*, 504.
13. Unjust prejudices and unreasonable jealousies, influencing the testator against a child, are not (there being no question of undue influence) sufficient to avoid the will. *Ib.*
14. If it does not appear, but that the habitual drunkard was always able to talk coherently and understand what he was about, and it appears that he was entirely rational when the will, drafted by himself, was executed, it should not be rejected. *Ib.*

MINORS.

See INFANTS.

NEGLIGENCE.

Evidence to charge public administrator with, in loaning money on deposit in bank which fails. See EVIDENCE, 1.

NEW YORK COUNTY, (SURROGATE OF)

1. The Surrogate of the city and county of New York may reject a separable part of a will for undue influence, while admitting the residue of the instrument to probate. *Baker's will*, 179.
2. The provision of the act of 1870, restricting the remedy for impeaching a

- decree of the Surrogate of the city and county of New York to a proceeding by appeal, does not apply against one who was not a party to the proceeding in which the decree was made *Bailey v. Stewart*, 212
3. The Surrogate of the city and county of New York, has, by the act of 1870, the same power to open, vacate and modify his orders and decrees as is exercised by a court of a general jurisdiction. *Ib.*
 4. This power is equal to that exercised by a court of equity on a bill filed for relief against a judgment or decree, for fraud or mistake. *Ib.*
 5. An application to the Surrogate of the city and county of New York to open his decree, is not a matter of legal right, but is addressed to his discretion, to be exercised with a just regard to the interests of the respective parties. *Ib.*
 6. By the term "discretion" here, it is not meant that his decision of the application would not be reviewable, but such a discretion is intended, as would justify the granting or denial of the application according to the circumstances and equity of the case. *Ib.*
 7. Judicial discretion never means the arbitrary will of the judge; it is always legal discretion, to be exercised in discerning the course prescribed by law; when that is discovered, it is the duty of courts to follow it; it is to be exercised not to give effect to the will of the judge but to that of the law. It is a judicial balancing of the rights and remedies of the respective parties, which constitutes the right exercise of judicial discretion. *Ib.*
 8. Under the provisions of the act of 1870, (Laws of 1870, chap. 359), the Surrogate of New York County has full power, authority and jurisdiction, upon proceedings for the probate of a will, to pass upon the validity, construction or legal effect of any of the dispositions of the will, when called in question by any of the heirs, next of kin, legatees or devisees, as amply and conclusively as the Supreme Court may do. *Curran v. Sears*, 526.
 9. But the Surrogate should refuse jurisdiction in such a case unless all the parties interested in the controversy are brought before him. *Ib.*

NEXT OF KIN.

Under statute of distribution. See DISTRIBUTION, 3.

OBJECTIONS TO ACCOUNT.

Grounds of, how required to be pointed out on accounting. See ACCOUNTING, 4.
When and how may be taken on behalf of minors. See ACCOUNTING, 5.

PAYMENT.

Of annuity, when and how made, and upon what conditions allowed in advance under 2 R. S. 98, §82, 83. See ANNUITY, 1, 2, 3.

PAYMENT OF DEBTS.

1. One who holds a judgment against the decedent and a third person recovered for a cause of action such as dies with the person, is not entitled to an order requiring the executor or administrator of the decedent to pay an equal share of the judgment. *Hammond v. Hoffman*, 92.
 2. *It seems* that upon the death of one bound by a joint judgment for such a tort, the creditor cannot enforce payment from the estate, until he has exhausted his remedy against all the survivors. *Ib.*
 3. The fact that some of the survivors are insolvent, and that another of them may therefore be compelled to pay the whole judgment, without remedy by contribution does not give the creditor a right to pursue the estate. *Ib.*
 4. While considerable latitude will be allowed an administrator in the payment in good faith, of the intestate's debts, even if of doubtful validity, yet a payment to the administrator's own wife, of an alleged debt, long barred by the statute of limitations, and which she could not, as a married woman, have recovered in law, will not be allowed to the administrator on a settlement of his accounts. *Freeman v. Freeman*, 137.
 5. An executor may be allowed a demand in his own favor against the decedent, if it be not barred by the statute, though it be presented for the first time during a contest raised by the legatee against his account, and though he testifies that he interposes it only in consequence of such contest. *Gillespie v. Brooks*, 346.
 6. The wrongful act of the executor or administrator in commingling trust funds held by the decedent with funds of the estate, cannot be allowed to prejudice *cestui que trust*. *Graham v. Van Duzer*.
 7. The decedent received for the price of property, sold by him as agent, a draft payable to his own order for a sum, of which part belonged to himself for commissions, and part to his principal. The executrix collected the draft, and mingled the proceeds with the moneys of the estate. *Held*, that the principal was entitled to be paid in preference to creditors of the estate; and if need be, in preference to funeral expenses. *Ib.*
- When leave to issue execution on judgment to enforce payment of a debt due from estate will be allowed. See EXECUTION.*

PRACTICE AND PLEADING.

1. A decree settling the account of an executor, &c., will only be opened on petition for that purpose, alleging proper grounds thereof, such as default, mistake, accident. or error. *Hart v. Duffy*, 151.
2. The Surrogate will not, after a lapse of six years from the final settlement of an executor's accounts, compel the executor to account for portions of the estate alleged to have been purchased by the executor himself

- or otherwise improperly applied, where it appears that such purchase and application of funds were made with the knowledge and assent of the party in whose interest the accounting is sought, a residuary legatee, and that the latter was cognizant of, and consented to, the accounts of the executor as finally settled. *So held* upon an application by a receiver of the property of the residuary legatee. *Ib.*
3. The duty of counsel to reduce to writing stipulations in the nature of admissions of matters of fact,—considered. *Field v. Field*, 160.
 4. An order made after the filing of papers in opposition and fully hearing counsel, is not to be deemed taken by default, within the rules as to leave to open, merely because it was finally made in the absence of the counsel, after adjournments for his convenience. *Ib.*
 5. To justify opening a default, it must appear that the defaulting party has suffered loss or injury, which justice requires he should be permitted to recover or repair. *Ib.*
 6. A citation to answer a petition to remove a guardian must be served on the guardian, although she be incapacitated by insanity. *Dammarell v. Walker*, 198.
 7. On an application to open a decree to allow one who was not a party to the proceeding to adduce proofs, the court should not pass upon the probability or improbability of the case alleged in the applicant's petition. *Bailey v. Stewart*, 212.
 8. If a petition for probate, verified by the person most likely to know,—e. g. the testator's widow,—alleges that he left no heirs, next of kin or relatives, whatever, the issue of citations is unnecessary. *Ib.*
 9. Leave to issue execution should not be granted by the Surrogate on a petition which is not verified. *Matter of Howell*, 299.
 10. A verification by attorney, which does not allege any reason why it is not made by the party, nor indicate the affiant's means of information, nor the grounds of his belief, nor how much is stated on information and belief,—is not sufficient. *Ib.*
 11. Practice in the New York Surrogate's court is to be assimilated as far as may be to that in courts of record. *Goulburn v. Sayre*, 310.
 12. A petition will be determined upon the papers presented, or referred to in the citation. The court will not consider other papers, though on the files. *Ib.*
 13. On an application to the Surrogate to sign the record of business left incomplete by his predecessor, it is proper to require proof by affidavit or otherwise, of the facts; and to recite in the record, the mode in which the record was completed. *Matter of Espie*, 445.
 14. The parties in interest should have opportunity to be heard on such application, unless their consent is produced. *Ib.*
 15. An order requiring executors to make payment of a legacy should not be granted without reasonable notice to the executors; but if it is so granted and the executors are before the court, the relief may be granted. *Kerrigan v. Kerrigan*, 517.

In regard to passing upon and determining accounts of executors or administrators

- on petition of creditor or legatee without petition for final accounting.* See ACCOUNTING, 6.
- As to notice of appointment of collector.* See COLLECTOR, 3, 4.
- Court will correct error prejudicial to infant although acquiesced in by their special guardian and counsel.* See INFANTS, 1.

PRESENTATION OF CLAIMS.

- To executors or administrators of deceased, when not necessary.* See ACCOUNTING, 3.

PRESUMPTION.

- As to conveyance being intended as advancements where deceased procures it to be made by a third party.* See ADVANCEMENT, 2, 3, 4.
- In regard to ownership of property deposited in name of "A. or B."* See DONATIO INTER VIVOS, 2.
- Facts necessary to raise presumption of knowledge in administrator of condition of insolvent bank.* See EVIDENCE, 1.
- Of death from continued disappearance, when raised.* See EVIDENCE, 4.

PROBATE.

1. The probate is not merely dependent on, and effected by the proofs taken ; but the Surrogate's decision on the sufficiency of the proofs, which the statute requires him to enter in his minutes, is a determination of the court upon the proofs submitted. *Bailey v. Stewart*, 212.
2. By parity of reasoning, if probate was refused by mistake or misapprehension, the decree refusing it should be opened, and the application reheard. *Ib.*
3. On an application to vacate probate, on a petition alleging undue influence, &c, if the proponents of the will move to dismiss the petition before opportunity to take proofs is given, their motion must be determined upon the assumption that all the allegations of the petition are true. *Bailey v. Stewart*, 212.
4. The probate of a will of real property, is only *prima facie* evidence of the validity of the will, which may be impeached by the heirs in an action. *Ib.*
5. Hence probate of such a will, if void, would be no obstacle to the remedy of the heir in an action. *Ib.*
6. Testator left a widow, and a very large real and personal estate, and an active business. A petition by the widow for probate was presented alleging that he left no heirs, next of kin, or relatives whatever ; and the will was admitted to probate immediately without the issue of any citation. Subsequently a petition was presented by one claiming to be an heir, asking that the probate be opened, and proofs

taken, and alleging that the will was invalid for undue influence. On the hearing, the petitioner consented that the probate stand as to personal property, and pressed the application only as to the will as a will of real property. *Held*, that as the heir might impeach the will as to real property by action, notwithstanding probate, and as the title to a very large amount of real estate would be discredited, and the execution of the testator's intentions hindered, by opening the probate, the application should be denied. *Id.*

Power of Surrogate to open, vacate, or modify. See JURISDICTION, 6.

When no citation necessary on. See PRACTICE AND PLEADING, 8.

PUBLIC ADMINISTRATOR.

When entitled to administer in preference to disqualified next of kin. See ADMINISTRATION, 3.

REAL ESTATE.

Effect of direction in will to sell, on dower right. See DOWER, 1: SALE.

REFERENCE.

The desire to interpose a defence, such as the statute of limitations, is no excuse for refusing to refer a claim against the estate of a decedent; because any defence which could be interposed in an action may be interposed on a reference. *Tucker v. McDermott*, 312.

REMOVAL OF GUARDIAN, EXECUTORS, AND ADMINISTRATORS.

See GUARDIAN AND WARD, EXECUTORS AND ADMINISTRATORS, AND JURISDICTION, 10, 11.

RES ADJUDICATA.

As to how far order of Surrogate on application for probate is. See PROBATE, 1-

SALE OF REAL ESTATE.

1. On application for leave to dispose of real property for payment of debts, the Surrogate cannot pass on claims presented against the estate by the heir or devisee, and disputed by the executor or administrator. His authority as to disputed claims is limited to those resisted by the heir or devisee. *Matter of Glann*, 75.
2. The decedent in her life-time conveyed land in fraud of creditors, to one who was now her heir. A creditor recovered judgment for his demand, against the administrators, after a trial on the merits. He

also recovered a judgment against the heir, setting aside the fraudulent conveyance, so far as necessary to allow him to proceed for a sale of the lands. The administrators then applied for leave to sell the decedent's land, for payment of debts.

Held, 1. That as the application included other lands besides those affected by the fraudulent conveyance, the heir might raise the same objections that he might have raised, had there been no fraudulent conveyance and decree vacating it. 2. Irrespective of there being other lands included, the heir was not precluded from questioning the validity and amount of the debt on which the creditor had proceeded. *Jennings v. Jones*, 95.

3. The principle that a judgment against one sued as an individual, is not an estoppel against him in a subsequent action in which he appears in a representative character, applied where in the second action he claimed as heir. *Ib.*
4. If lands of a decedent, sold by order of the Surrogate, are in a city, notice of the sale must be posted in the ward where the land is situated, 541.
5. The omission to post notice there cannot be disregarded by the Surrogate on an application to confirm the sale. *Ib.*
6. The party making such sale is chargeable with notice of the defect of posting, and therefore cannot claim as a *bona fide* purchaser. *Ib.*
7. To divest one of his property by a special statutory proceeding, very direction of the statute must be strictly complied with. *Ib.*

When Statute of Limitations against runs in favor of him who has taken fraudulent conveyance from his ancestor. See LIMITATION OF ACTIONS. 2.

SEAL.

Mucilage being a substance sufficiently tenacious to adhere, and capable of receiving and retaining an impression, a bit of paper affixed with mucilage and stamped on with a permanent impression, is good as a common law seal. *Gillespie v. Brooks*, 349.

SEARCH AND SEIZURE.

In proceedings in Surrogate's courts (under L. 1870, Ch. 394) for the search and seizure of property of the decedent alleged to be withheld from the administrator, the Surrogate has no power to try the question of the title to the property in dispute. *Summerfield v. Howie*, 149.

SECURITY FOR DUE ADMINISTRATION OF ESTATE.

1. The whole estate consisted of realty, with an annual rental of \$30,000 held by the executor in trust under the will. On an order being made removing the executor in default of his giving a bond, with sureties,—*Held*, That the amount of the penalty of the bond required of him was discretionary with the Surrogate. *Matter of Hart*, 165.

2. *Held further*,— That the sureties on such a bond would not be required to justify in double the amount of penalty. *Ib.*
3. The proceeds of a life policy taken out by the testator, and by its term payable to his children, are not assets of the estate. *Senior v. Ackerman*, 302.
4. But, the children being minors, the custody of such proceeds belong to testamentary guardians appointed by the testator. *Ib.*
5. Such fund should therefore be considered with the assets, in fixing the amount of security to be required from the executor and guardian as an alternative of ordering his removal. *Ib.*
6. The amount of security proper to be required from one of several co-executors, administrators or guardians is to be fixed in view of the actual amount of the fund and cannot be reduced by considering any arrangement between him and his colleagues by which they assume the exclusive control and responsibility of the trust. *Ib.*

SERVICE.

Of citation to remove Guardian ; how served on Guardian. See PRACTICE AND PLEADINGS, 6.

SPECIAL ADMINISTRATOR.

See COLLECTOR.

STATUTE OF DISTRIBUTION.

See DISTRIBUTION.

SUBSCRIPTION OF WILL.

How proved when made by mark, and only one subscribing witness, examined. See WILLS, 5, 6, 7.

TAXES AND ASSESSMENT.

1. All ordinary taxes, assessments, and interest on incumbrances, and charges for ordinary repairs, must be paid out of the income by the life tenant. *Gillespie v. Brooks*, 349.
2. In the case of permanent improvements to the estate, the life tenant must be held liable for the interest and the remainderman for the principal. *Ib.*

TESTAMENTARY TRUSTEES.

Rate of commissions to whom allowed. See COMMISSIONS, 3.

See also, TRUSTEES.

TRUSTEES.

1. Under a gift to A. of the interest to accrue on all testator's estate during A.'s life, "and at her death to be distributed as follows: the sum of \$1,000 to B." &c., the executor is, by implication, trustee of the fund during the life of A. *Edsall v. Waterbury*, 48.
2. Upon the death of the trustee of an express trust of personal property, as well as where the trust is of real property, the trust devolves upon the Supreme Court. *Wells v. Wallace*, 58.
3. If it appears that the trust fund was so mixed by the trustee with his own property that it cannot be separated or indentified, it must be paid *pro rata*, as the creditors of the trustees are paid. *Ib.*
4. Executors and testamentary trustees with general power to invest and reinvest a fund, are bound to invest it within a reasonable time, in securities of the class sanctioned by the court. *Gillespie v. Brooks*, 349.
5. If the assets left by the testator consist of stocks of private corporations, they should sell them and duly invest the fund within the eighteen months allowed for settling the estate. *Ib.*
6. If they neglect to do so, they are personally liable for loss by the depreciating of such irregular securities left by the testator, after the expiration of the eighteen months. *Ib.*
7. Where some of such securities maintain full value or increase in value, and others depreciate, the *cestuis que trustent* may elect to accept the investment as to the former, and claim the enhanced value and income therefrom, and still reject the latter, and hold the trustees chargeable with the loss thereon. *Ib.*
8. The trustees are liable in such case, although they acted in good faith.
9. The fact that the trust is not terminated, does not preclude the exercise of the election by the *cestuis que trustent*. *Ib.*
10. The right to have an account of the trust taken and settled, includes a right on the part of all the beneficiaries who are *sui juris*, to elect as to the irregular investments. *Ib.*
11. On the final settlement of an account rendered by testamentary trustees, the Surrogate has power, upon written consent of the parties who have appeared, to distribute or apportion undisposed of assets or securities, among the parties in interest, in the same manner as on an accounting by executors and administrators. *Carman v. Cowles*, 414.
12. Whether the practice that has prevailed, of allowing such distribution in case of securities over due, is sanctioned by the statute, *query?* *Ib.*
13. It seems that a *cestui que trust* under a will may be also trustee. *Mat-of Moke*, 429.
14. But since a *cestui que trust* is not altogether a fit person to be a trustee, if the will is ambiguous in this respect, the court will favor a construction which does not have such a result. *Ib.*
15. Testator named his wife "executrix," and other persons executor, and trustees, and the exercise of certain of the powers of the trustees

were made conditional on the widow's consent. *Held*, That she was not made a trustee. *Ib*.

16. The Surrogate's court has no general jurisdiction over testamentary trustees, other than that expressly conferred, or necessarily implied, by statute. *Savage v. Olmstead*, 478.
17. It has no power to control their conduct as such, except so far as their accounting, giving security, their removal, and the appointment of successors is concerned. *Ib*.

Commissions of. See COMMISSIONS, 7, 8, 9, 10, 13, 14, 15, 16.

Power of Surrogate of his own motion to compel them to account, and to settle their account. See JURISDICTION, 12, 13.

Authority of Surrogate over testamentary trustees. See, JURISDICTION, 17, 18, 19.

VACATING DECREE.

Void decree not vacated, because to do so would be superfluous. See DECREE, 2.

VERIFICATION.

When may be made by attorney. See PRACTICE AND PLEADING, 10.

UNDUE INFLUENCE.

See FRAUD AND UNDUE INFLUENCE.

UNFINISHED BUSINESS.

Practice on signing record of. See PRACTICE AND PLEADING, 13, 14.

WILLS.

1. The testator, in his last sickness, very feeble and unconscious unless aroused, sent for a neighbor to draw his will, and stated that he wished, all his property to go to his sister (who lived with him as housekeeper) and her son a lad of thirteen. The neighbor drew the will, omitting (by mistake, he testified) to provide for the last, and then read the will to testator, who was aroused for the purpose and approved it after it was read, and directed the draftsman to sign for him. Without further formality, the draftsman did so, and added his own name as subscribing witness, and requested the lad to subscribe as the second witness, which he did; but there was no evidence that the testator was conscious of this request or of the acts of signing. *Held*, Not a valid execution. *Sanders v. Stiles*.
2. Where there is a full attestation clause, and the only witness, so far as

he testifies affirmatively, supports due execution, the fact that he testifies in the negative as to some essential formalities, if it may be reasonably explained by presuming non-recollection, is not a reason for refusing probate. *Norton v. Norton*, 6.

3. Testator, an active and competent business man, wrote his own will with full attestation clause. The will was produced from a place of safekeeping among his papers, and the blank for the date appeared filled and the signatures made with the same ink, and apparently at the same time. The only surviving witness testified that he and the other witness signed immediately after testator's request to him that he should witness a paper which the testator produced as his will; but that according to his recollection, the testator did not sign in their presence nor acknowledge his signature. *Held*, sufficient to establish execution and publication. *Ib.*
4. Where there is no suggestion of incapacity, fraud or undue influence, the hardship or injustice of the will can have no weight in determining the sufficiency of the evidence of formal execution. *Ib.*
5. A will which the testator subscribed by mark may be proved, even when only one of the subscribing witnesses can be examined. *Simpson's Will*, 29.
6. Under the provision of 2 R. S. 59, § 13, which requires that when one or more of the witnesses are examined, and the others are inaccessible, &c., proof of handwriting of the testator shall be taken, and of the witnesses dead, absent, or insane, and of such other circumstances as would be sufficient to prove the will on a trial at law,—evidence of such other circumstances may be sufficient, where the testator's subscription was by mark. *Ib.*
7. In such a case the testimony of the only surviving subscribing witness fully attesting all the formalities, and directly and fully corroborated by three others, who saw the testator execute the will and heard his publication and request,—*Held*, sufficient. *Ib.*
8. Testimony of one of the subscribing witnesses to the will, corroborated that before the witnesses signed, the testator answered in the affirmative to an inquiry whether the instrument which he had subscribed was his last will and testament. *Held*, sufficient evidence of publication prior to attestation, though contradicted by the other witness. *Stewart's Will*, 77.
9. It appeared that the testator had declared to the draftsman that he had selected such persons who in fact became witnesses, for that purpose, and had requested them to be sent for; and after he subscribed, they were directed to sign, the testator moving away from the table where he had signed while they were looking on. There was also evidence of prior publication. *Held*, that these circumstances sufficiently proved request. *Ib.*
10. The reading of the attestation clause, in testator's presence, even after it has been signed by the witnesses, is sufficient evidence of his request to sign, recited in it. *Ib.*

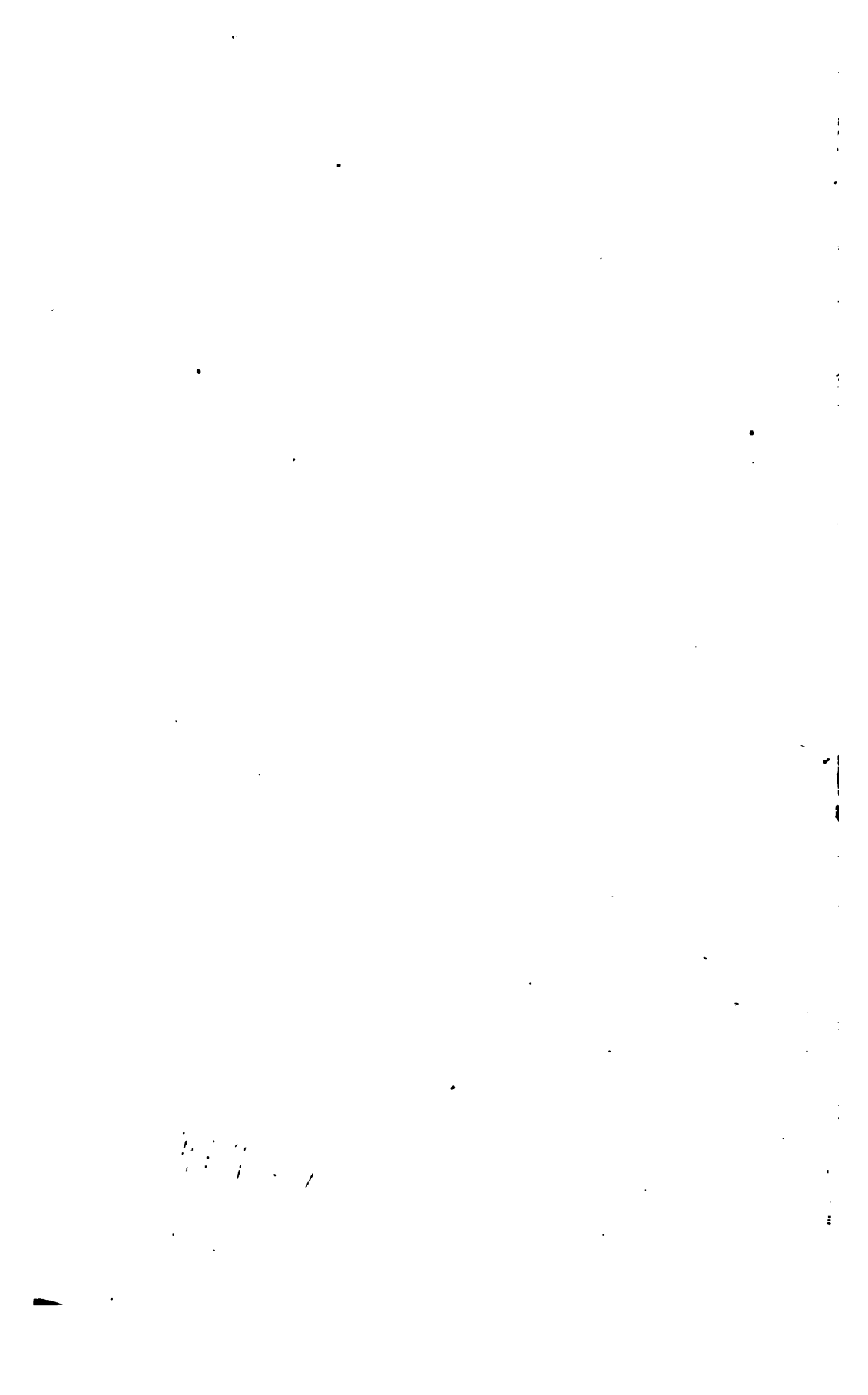
11. The publication on the part of a testator need not be in express words. It is sufficiently shown by evidence that in the hearing of both witnesses, the testatrix asked the witness to draw her last will and testament, and when he had done so, and had read it aloud to her, she approved and signed it. *Burke's Will*, 239.
12. The fact that there is no attesting clause to a will does not affect its validity. *Ib.*
13. Valid publication of a will is not made out by evidence that, immediately before execution, it was read to and approved by the testatrix, in the presence of one only of the two subscribing witnesses. *Neugent v. Neugent*, 369.
14. Where there was no sufficient attestation clause to aid the evidence of execution, it appeared by testimony of the witnesses that there was no express declaration by the testatrix that the instrument was her will, nor did the witness who attended to its execution make any such declaration to the other subscribing witness; and it appeared that one of them heard the will read to and approved by the testatrix, but the other did not. *Held*, that there was no valid publication. *Ib.*
15. Although it is not essential that attesting witnesses should subscribe in the presence of each other nor in the presence of the testator, provided they do so at the time of execution or acknowledgment, yet it is essential that their subscribing be with the knowledge or at the request of the testator. *Ib.*
16. Where a testator caused to be prepared a codicil modifying his will in respect to certain trusts therein created, and republishing it as modified, and at the same time caused to be prepared a trust deed, involving the same property and beneficiaries, and there was some evidence that he intended to execute them simultaneously, but because of the absence of a party, failed to execute the deed until sometime after he had executed the codicil. *Held*, that they were to be considered together, and construed as intended to be harmonious. *Wade v. Holbrook*, 378.
17. If there be, in such a case, substantial conformity in the provisions of the deed and the testamentary act, the deed is not to be regarded as a revocation of the will. *Ib.*
18. The testamentary act passes after-acquired property while the deed does not; and therefore the former should not be deemed necessarily revoked by the latter. *Ib.*
19. The fact that the deed expressly includes after-acquired property which may come to the hands of a particular agent, does not affect the question of constructive revocation. *Ib.*
20. The objection that a trust in the will may violate the statute restricting the suspension of the power of alienation, is not ground for refusing probate of the will. *Ib.*
21. If an ulterior trust is void on this account, it may be dropped, allowing the primary provisions to stand. *Ib.*

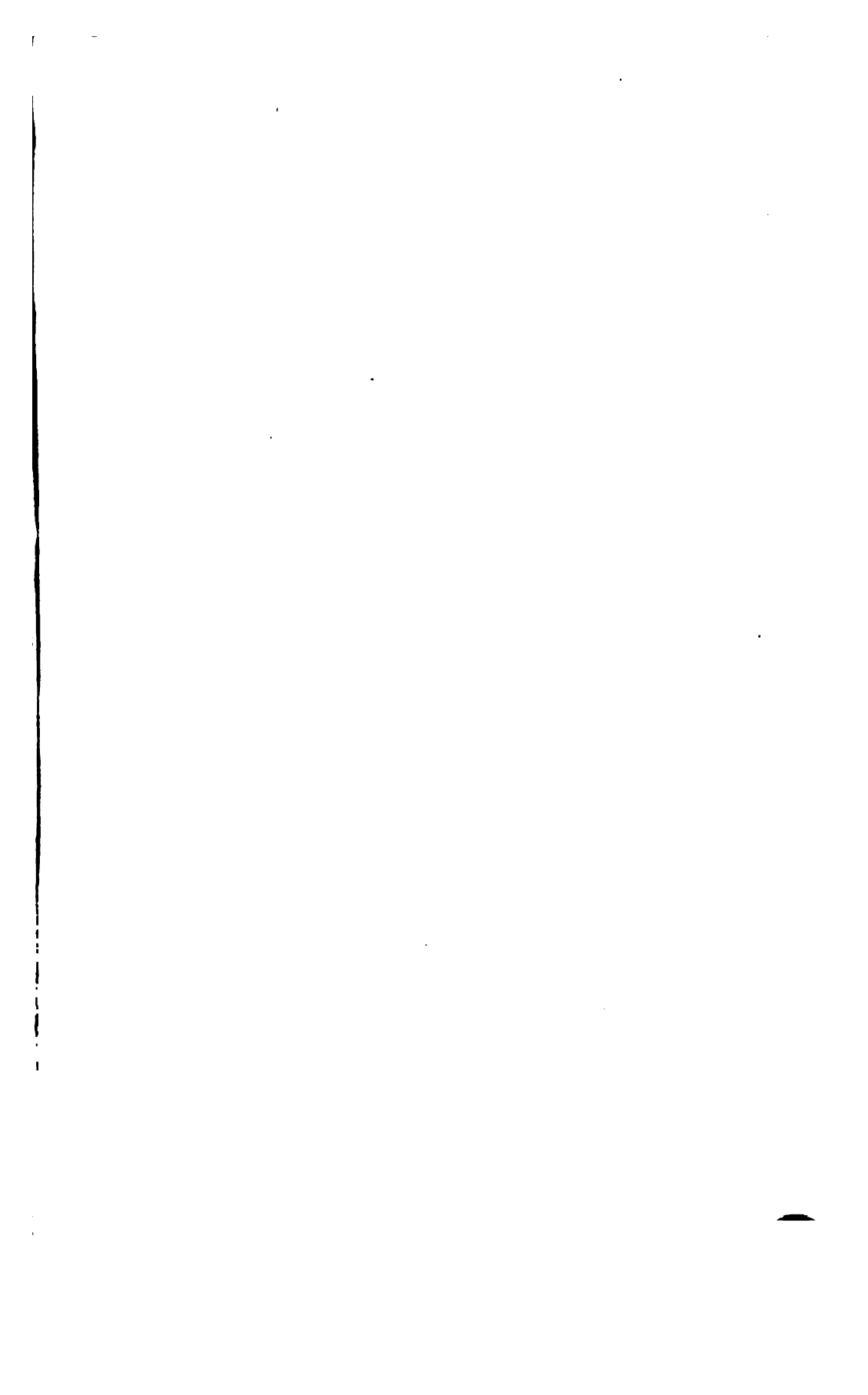
22. The signatures of the attesting witnesses need not immediately follow that of the testator; but the attestation clause may intervene. *Williamson v. Williamson*.
23. A will was proved by a full attestation clause, by proof of the handwriting of testators' signature, and that of two subscribing witnesses, deceased, and by the testimony of an attorney who was a third subscribing witness; and it appeared that the testator was also a lawyer, and the will was in his handwriting. *Held*, sufficient. *Ib*.
24. The provision of 2 R. S., 58, § 13, that the proponent of a will for probate, on proving it by the handwriting of the testator and deceased witnesses, should give proof of such other circumstances as would be sufficient to prove the will on a trial at law,—does not require further evidence than this. *Ib*.
25. Under 2 R. S., 64, § 42, there can be no implied revocation of a will, by means other than such as are defined in the statute. *Ordish v. McDermott*, 460.
26. A will made in ignorance of the existence of a living child, is not revoked, even at common law, by the discovery of its existence. *Ib*.

WITNESS.

To personal transaction with deceased, competency of under § 399 of Code of Procedure. See EVIDENCE, 2.

Ex. L. A. A.







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